UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION

UNITED STATES OF AMERICA,

Petitioner,

v. No. 5:06-HC-02195-BR

GRAYDON EARL COMSTOCK, JR.,

Respondent.

Bench Trial - Vol. II
HON. BERNARD A. FRIEDMAN, Judge
November 29, 2011
8:30 a.m. - 7:15 p.m.
Raleigh, North Carolina

REPORTED BY: Joseph C. Spontarelli, CCR

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P R O C E E D I N G S

8:45 a.m.

MR. ROYSTER: Our first witness will be Dr. Lela Demby by way of video deposition.

THE COURT: Any objection that the court reporter won't take down the deposition but that the deposition will be introduced as evidence in this matter and the record will reflect the contents thereof?

MR. ROYSTER: No objection from the government, Your Honor.

MS. SHEA: No objection.

(Whereupon, the deposition of Dr. Lela Demby by way of video was commenced.)

(Video stopped.)

THE COURT: To save a little time there's no objection to her qualifications, is there?

MS. SHEA: No, Your Honor.

THE COURT: Maybe we can fast forward it since there are no objections to her

qualifications. I have her CV in front of me. We can fast forward it to the start of her testimony.

Any objection by either side?

MR. GRAY: No objection, Your Honor.

MS. SHEA: No objection, Your Honor.

(Video continued.)

(Video stopped.)

THE COURT: I would suggest I'm hearing it and listening to it. If there is anything that I will sustain the objection for I will let you know. If you don't hear from me that means that the objections are overruled for both sides.

As to the exhibits in the deposition I'll rule on those all at one time.

I think I reversed what I said before. They will be overruled unless I sustain the objection. I said it the other way.

As to the exhibits, I'll rule on those all at one time. This particular objection I would overrule.

(Video continued.)

(Video stopped.)

THE COURT: Let's take a break. We'll take 20 minutes give or take.

(Recess.)

(Video continued.)

THE COURT: Let the record reflect the Court has had an opportunity to review the total deposition. The Court has no additional questions.

I indicated I may reserve the opportunity to question the doctor when she returns from vacation but after listening to the deposition I have no questions. I think they have all been sufficiently covered for me.

It's my understanding the government has no further witnesses, is that correct?

MR. ROYSTER: That's correct, Your Honor.

THE COURT: Maybe right now is a good time to talk about the exhibits. Have you had an opportunity to discuss them with each other?

MR. ROYSTER: We talked about some.
THE COURT: Is it fair to say that the list that's contained in the pretrial statement is that which the government wishes to introduce at this time?
MR. ROYSTER: Your Honor, we would like to strike a couple of the exhibits we put in our pretrial.
THE COURT: The witnesses are no problem since you rested your case.
MR. ROYSTER: I misspoke.
THE COURT: I have page three of ten which are the petitioner's exhibits. Let's go through them since we have them and we'll go from there.
For 1, 2, 3, 4, 5, 6, 7, 8 there's no objections. Any of those that you wish to strike?
MR. ROYSTER: No, Your Honor.
THE COURT: Nine is objections as to the hearsay, double hearsay, violates Sixth Amendment. Counsel?
MS. SHEA: Your Honor, on this one we object because Mr. Comstock has the right to confront witnesses against him. We thought that this was hearsay. It was testimonial because it

was made after Mr. Comstock had been certified.

We also wanted to point out specifically the whole purpose of this report is really the first sentence of the second paragraph and this is hearsay within hearsay. This is double hearsay. I was informed by another staff member that it is suspected that inmate Comstock may have propositioned another inmate. That's hearsay within hearsay. There's no exception we believe they can cite to to get that in so we wish to have that excluded.

THE COURT: Counsel, any argument as to that?

MR. ROYSTER: Your Honor, I certainly understand they have a point with respect to it being hearsay within hearsay. I'm not aware of a point of an exception that would apply specifically to the double hearsay.

I believe the experts did rely on it. There is some information about this particular incident, I believe, in Dr. Demby's report and we do believe it's relevant.

THE COURT: There was nothing in her testimony to that effect.

MR. ROYSTER: That's true.

THE COURT: I'm going to not strike the total document but I'm certainly going to strike that for two reasons. Number one, I think it is double hearsay. As I said at the beginning when we talked about prejudicial -- everything is prejudicial but I think this is extremely prejudicial. There is nothing to back it up. Neither of the experts for the government testified as to any reliance upon that. I will strike that.

MR. ROYSTER: Judge, just for convenience we can strike the entire exhibit.

THE COURT: Perfect.

MS. SHEA: Thank you, Your Honor.

We withdraw our objection to Exhibit 10.

THE COURT: Okay. 11?

MS. SHEA: 11 we object to. Hearsay within hearsay again. We believe that the purpose of this exhibit is for what Mr. Comstock's sister told Mr. Comstock and in turn Mr. Comstock told back to his physician. That's also hearsay within hearsay. They're welcome to cross Mary Comstock on whatever they like, but we don't see how that falls within any exception either.

THE COURT: I remember reading this exhibit. I thought it was for a different paragraph about the treatment.

MR. ROYSTER: That's right.

THE COURT: I didn't even see the thing about the sister.

I'll strike the thing about the sister. Again, there was some vague testimony somewhere down the line. I have it circled not even close to that portion.

MS. SHEA: It's the last sentence of the second paragraph.

THE COURT: Thank you.

I can strike that whole paragraph. Your purpose was for the third paragraph.

MR. ROYSTER: That's right.

THE COURT: We'll strike the second paragraph.

MS. SHEA: We maintain our objection to Exhibit 12. This has already been cited in the Motions in Limine. We've lodged our objection.

THE COURT: Objection noted.

MR. ROYSTER: Just for the record is 12 admitted, Judge?

THE COURT: 12 is admitted.

MS. SHEA: 13 is a report done by Dr. Hernandez. We objected to this on hearsay grounds. They could have called Dr. Hernandez to get this report in. As it stands right now we believe that it's hearsay and doesn't fall within the exception.

THE COURT: Counsel?

MR. ROYSTER: Judge, first of all we would contend that it is a business record of BOP, but we would have it for purposes of the statements that Mr. Comstock made to Dr. Hernandez as admissions of a party involved.

THE COURT: I'll admit it. There is hearsay and so forth. Since it's a bench trial the Court will give it the weight for which it's due.

If I'm not mistaken it was at least referred to as one of the documents that were reviewed by the experts.

MS. SHEA: 14 and 15 we believe those are settled through the Motions in Limine. We withdraw our objections for 16 and 17.

THE COURT: For the record 14, 15, 16 and 17 will be admitted.

MS. SHEA: Exhibit 18 is an incident

report. We believe this is completely irrelevant to all three prongs of the Adam Walsh Act. This has no bearing on whether Mr. Comstock will have serious difficulty in refraining from molesting children.

MR. ROYSTER: We'll strike that exhibit.

THE COURT: Very well. 18 will not be received.

MS. SHEA: For 19 and 20 we withdraw our objections.

THE COURT: 19 and 20 will be received.

MS. SHEA: 21 already is received.

22 and 23 are the Motions in Limine.

THE COURT: Received. 24 and 25 --

MR. ROYSTER: We're striking both of those, Judge, just to save you the time.

THE COURT: 26?

MS. SHEA: 26 and 27 were also resolved through pretrial motions.

THE COURT: 28 there is no objection. So ordered as to that.

Government having rested respondent may proceed.

MS. SHEA: At this time the respondent

calls Dr. George Corvin.

GEORGE P. CORVIN, M.D.,
was sworn or affirmed and testified as follows:

THE COURT: Doctor, would you be kind enough to give us your full name and spell your name, please.

THE WITNESS: My name is George Patrick Corvin, M.D. My last name is spelled C-O-R-V-I-N. I'm a forensic general psychiatrist in Raleigh, North Carolina.

THE COURT: Counsel you may proceed with your examination of the witness.

DIRECT EXAMINATION

BY MS. SHEA:

Q Good morning, Dr. Corvin.

A Good morning.

Q You've been called as an expert to give opinion about whether Mr. Comstock's medical condition would have any notable effect on his sexual functioning.

A I have.

Q Why are you qualified to give that opinion?

A Well, I'm a medical doctor and I carry an unrestricted license to practice medicine in the State of North Carolina. I've practiced medicine in Alabama and South Carolina and Georgia in one way, shape, form or fashion over the years and as a general and forensic psychiatrist first and foremost I attended medical school and continue to practice that medical specialty.

Q I would like to turn your attention to Exhibit 1 in the respondent's binder of exhibits.

A What is Exhibit 1?

Q It should be a copy of your CV.

A I'm with you now.

Q Do you recognize this to be your CV?

A I do.

Q In particular can you tell us about your board certifications?

A I have a board certification in general psychiatry with added qualifications in the field of forensic psychiatry.

I initially became board certified in general psychiatry through the American Board of Psychiatry and Neurology in 1997 and recertified

in 2007. I became board certified with added qualifications as a forensic psychiatrist in 1998 and recertified again in 2008.

Q Can you tell the Court about what the certification process entailed?

A There are multiple steps to obtaining board certification in any area of medical specialty. To become eligible one has to have completed an approved and appropriate educational program. In my case I attended medical school at the University of Alabama School of Medicine and graduated from there after four years with my medical degree.

I then chose to pursue a residency in psychiatry. That was another four years of training at the Medical College of Georgia.

I stayed in Georgia my last year there as chief resident for the program and had some administrative and research responsibilities and duties at the Medical College of Georgia.

I finished there and then decided to delay going out into the workforce for an additional year and pursued what's called a fellowship which is a period beyond residency where physicians can subspecialize. For example,

cardiologists can do a fellowship in interventional cardiology. I chose to pursue a fellowship in forensic psychiatry which is what brought me to North Carolina and to the Bureau of Prisons.

During my fellowship I was housed and worked primarily at the federal correctional complex in Butner, North Carolina and am very familiar with their hospital and treatment setting there. In fact my office at one time was in the Maryland Unit where the respondent has been housed most recently.

Subsequent to completing those years of education you become eligible to sit for examinations through the American Board of Medical Specialties -- in this case the American Board of Psychiatry and Neurology. That entails a written examination, a series of oral board examinations where individuals who have been certified for a while will scrutinize your work with patients and actually watch and observe you interact with patients. That applies both for the general psychiatric boarding and also for forensic psychiatry. There's two sets of examinations. At periods in my career it seems like all I do is go

take exams all over the country.

After successfully finishing those series of written and oral board examinations then you become board certified.

Q You have five letters after the M.D. on your CV, DFAPA.

A Right.

Q Can you tell us what that means?

A That stands for Distinguished Fellow of the American Psychiatric Association.

In my career I've had the opportunity to work as a sort of consultant for the North Carolina Legislature. I have done some -- I don't know if I'd call it advocacy as much as educational efforts in terms of mental healthcare reform in the State of North Carolina. Commitment statutes, capital litigation processes -- some of that has to do with financial aspects of the delivery of psychiatric care and services in North Carolina.

As a result of some of that activity and some talks that I've given to groups of legislators the North Carolina Psychiatric Association called me about a year ago and asked if they could nominate me for this and I said will

it cost me anything and they said no. Basically they put me through this process and they called a bunch of people I work with and interviewed them and got letters and I became a distinguished fellow. I'm not sure what it means beyond that.

THE COURT: You're a distinguished fellow of the national association?

THE WITNESS: Of the national association.

THE COURT: I've never seen that before. Congratulations.

MR. ROYSTER: Our understanding is he's going to be testifying on the narrow issue of the medical history and how it may affect Mr. Comstock. He's not opining on sexual dangerousness. We don't have any objection to his being qualified to render an opinion on that.

THE COURT: You stipulate to his qualifications?

MR. ROYSTER: Yes, sir.

THE COURT: I would imagine so after seeing his CV.

MR. ROYSTER: Sure.

THE COURT: I'm glad you explained those letters to me. I saw them when I went

through this in preparation and I looked and I looked and I looked and I couldn't figure out what it was.

THE WITNESS: I labored about putting them there.

THE COURT: I've been in this business a long time. It's the first time I've seen this. I'm sure it's something that's very important to your career. Congratulations.

THE WITNESS: I appreciate that.

MS. SHEA: Thank you, Your Honor.

At this point we'll tender Dr. Corvin as an expert in general and forensic psychiatry and we'll enter Exhibit 1 into evidence.

THE COURT: One will be received. You will be qualified to so testify. You may proceed.

BY MS. SHEA:

Q So what did you review in preparing your opinion in this case?

A It came in stages, if you will. The Court may have in evidence already or will a report or a letter summarizing my work in this matter and that's dated August 2, 2011.

I had been contacted by either yourself or agents of the federal defender's office here in

Raleigh not long before this -- maybe a couple weeks before this -- at which time -- to be completely honest with you at which time I initially said I don't think I should be involved in this because I don't do these sorts of evaluations. I don't consider myself to have the expertise, training and expertise to rate risk factors in accord with the Adam Walsh Act.

After not hanging up too quickly I understood that that was not the analysis that was required. As the Court has heard already it is not my intention or desire to offer an opinion in terms of that ultimate issue.

To get back to your question in reference to the opinions that I have offered in this matter as outlined in my August 2nd letter prior to completing that document I reviewed a report that was entitled regarding the civil commitment of Graydon Comstock as a sexually dangerous person that was prepared by Terence Campbell, Ph.D.

I also reviewed a CD or electronic record containing Mr. Comstock's very extensive medical and mental health records during the period of time that he's been incarcerated within

the Federal Bureau of Prisons. Not included in those records for sake of clarification are any records either generated within the Bureau of Prisons or obtained by the Bureau of Prisons from Kansas any of his specific psychiatric records pertaining to his prior sex offender treatment programs nor have I reviewed those to this date.

I also reviewed prior to that in preparation of that letter the presentence investigation report dated December 7, 2000.

With those records I reviewed and focusing primarily on his medical and mental health records I was in a position to be able to formulate and offer the opinions that are summarized in that August 2nd letter.

Subsequent to preparation of the letter I have reviewed additional documents.

Q What additional documents?

A If I recall correctly I also then was provided a report that has been testified to in some detail by Amy Phenix, Ph.D as well as an addendum or an updated report.

I also reviewed the report of Lela Demby that we just saw in court -- her videotaped deposition. I reviewed her report.

I have reviewed a transcript of the deposition of Graydon Comstock the respondent. Of course I've been here in court witnessing testimony since this proceeding began yesterday.

Q Just to be clear, you're on Exhibit 2. That's the letter that you're referring to?

A Yes, ma'am.

Q What did your research show generally about age effect on sexual functioning?

A In the global perspective this aspect of my assessment is probably one of the easier forensic evaluations I've done.

I did go to the research pool on the subject and pull some review articles on the expected course of sexual functioning over the lifespan of an otherwise healthy male. It comes as no great shock to me that as one ages -- I'm focusing primarily on males -- there are some gender difference -- as an individual ages their functioning both in terms of libido and physiologic sexual functioning tends to abate.

Absent any other medical complications age alone is independently in research associated with a decline in what one review article actually termed a sexual prowess. I'm not sure how you

would define that clinically. There are some statistics that attach to that. One study -- this is by the way a review article that was done in May of this year from a group of researchers that -- excuse me -- physicians that has a subscription service called Up-To-Date. It actually is a very good way to see what is currently understood in various fields of medical care and treatment.

They had done a review article on this subject and found that as early as age 40 40 percent of otherwise healthy males acknowledge some level of impaired sexual functioning and that as men age another ten percent will generally recognize or report some decline. Not necessarily severe sexual dysfunction or impotence but some decline in their sexual interest and overall sexual health as they age. 40 percent at age 40, another ten percent with each succeeding decade. Overall five percent of men report some impairment in libido absent other confounding factors.

To answer your question directly, aging absent other indicators is not generally seen as helpful for a man's sexual functioning.

Q When reviewing Mr. Comstock's medical

records what medical conditions did you conclude he suffers from?

A He has had a lot; some of which are more directly related to my analysis than others.

We know that he had a hypertensive related hemorrhagic stroke in 1980 at a relatively early age. He was 39. He has subsequently had evidence of embolic infarcts which is a different kind of stroke probably related to other medical conditions and I probably should clarify what I mean there.

In 1980 he had a bleed in his brain that caused a stroke. Since he has been incarcerated he has had another cerebrovascular incident which has been termed as a TIA or a transient ischemic attack which is associated with many of the other medical conditions.

An MRI which has been obtained since he has been in custody showed some microvascular ischemic changes that are consistent with a condition that used to be called multi-infarct dementia. It is now called vascular dementia.

He has neuroimaging and findings in the medical history suggestive of cognitive decline with age as a result of multiple small otherwise

clinically unrecognized infarcts in his brain.

His memory during the years he has been within the Bureau of Prisons has also been noted to decline. I'm not sure if anybody else noticed, but when he was on the stand yesterday his cognitive efficiency is not what one would expect of an individual younger and healthier.

His medical records have suggested some concern he may have dementia. I'm not so sure I have evidence to support or refute such a diagnosis. His medical history seemed to support that. The observations of him having impaired memory seemed to be consistent with that. Some of the subtle findings that he exhibited while he was testifying show some decline in cognitive deficiency.

You may have noticed some difficulty capturing what he was trying to communicate. He was successful in doing so, but not as fluent or perhaps hyper-verbal as I am in talking to the Court.

He has a substantial history of both peripheral vascular disease and coronary artery disease. He had a posterior myocardial infarction that was pretty serious since he was incarcerated.

He underwent three vessel coronary artery bypass grafting as a result of that.

He continues to exhibit physical evidence of impaired peripheral perfusion. If you look at him now his pallor is somewhat of a pale appearance. That in and of itself is not diagnostic. What is more telling is that there are reflections or descriptions of him in his medical record with exertion his lips turning blue which is consistent with an impairment in peripheral perfusion also interrelated to the other medical conditions that I will finally get to.

In addition to his general cardiovascular disease he carries a diagnosis of Type 2 or adult onset diabetes mellitus. He continues to suffer from but is being treated largely successfully for high blood pressure.

He has a history of prostate cancer diagnosed in the mid '96/'97 timeframe. He underwent radiation therapy for that. The status of his prostate cancer at this stage I'm not entirely aware of; although it's been described as being in remission.

He is being treated for these

conditions with a number of different medications, and in fact has previously been prescribed nitroglycerin sublingually for symptomatic angina.

He has a number of very significant medical problems. Others perhaps not as contributory but worth noting is that he is on medications for gastroesophageal reflux disease. He suffers from what the BOP terms chronic functional diarrhea. He has a history of diverticulosis. His general overall state of health on his records is not good and on his appearance is not good.

Q The prostate cancer in particular that you mentioned, he was diagnosed while incarceration with that?

A While he was in custody within the Bureau of Prisons and treated as well.

Q I just wanted to clarify that.

A Sure.

Q What, if any, is the relationship between those medical conditions that you just outlined and sexual functioning?

A Just about anything that can affect one's overall general health can have an adverse effect on both the physiology and the emotional

component of sexual functioning.

You probably don't need a psychiatrist to sit up here and tell you that if you feel bad or you are sick or you view yourself as ill that your interest -- I'm not speaking about individuals with pedophilia but just in general terms -- sick individuals are not as focused on or as interested in all matters sexual as compared to those who are in good health or at least view themselves as being healthy. It's one of the first things that goes when you get sick.

It is certainly the case that individuals with these conditions that I've mentioned have substantial physiologic impairment or at risk of having substantial physiologic impairment.

For example, individuals with diabetes, high blood pressure, history of prostate cancer, peripheral vascular disease, history of heart attack, history of stroke, history of depression which I didn't note all independent of each other are associated with an impairment both in the emotional aspect self-report of interest in sex and separately but also relatedly. The physiologic aspects of sexual functioning like

erectile dysfunction for example. Erectile dysfunction can result from physical impediment such as inability to perfuse one's penis appropriately, but it has a very strong psychological component as well which can have an adverse effect or an enhancing effect.

Q What, if any, medications is Mr. Comstock currently taking?

A As of the date most recently reflected in his medical records from the Bureau of Prisons he is taking an antipsychotic medication called Abilify which is being used to treat a mood disorder and that's not unusual. He's taking Atenolol for blood pressure. He's taking Gemfibrozil which is for cholesterol. Lisinopril also for blood pressure. Loperamide which is to treat chronic diarrhea. Metformin which is an oral medication used in treating diabetes. Niacin which is sometimes used in managing lipid disorders. Prilosec for gastroesophageal reflux disease. Simvastatin also used in treating hypercholesterolemia. Terazosin which is actually used for treating prostatic hypertrophy but has some effects on blood pressure as well. He is taking an older antidepressant called Trazodone

and a newer antidepressant called Effexor. He is likely taking Trazodone primarily as a sleep aid; whereas Effexor is more potent in terms of actually treating the underlying mood disorder.

The Court has heard much about him being diagnosed with depressive disorder not otherwise specified. Dr. Demby has described him as meeting criteria historically for major depression.

Dr. Owens who is a psychiatrist I know and has at least previously been working with the respondent has diagnosed him as actually meeting criteria for atypical bipolar disorder. I respect Dr. Owens. I don't know where that diagnosis came from. I personally concluded that he had depressive disorder not otherwise specified because there's some uncertainty exactly what form his mood disorder is. It's clear he has suffered from depressive symptoms which can accurately be described as chronic in nature.

At any rate back on the subject of medications, several of these that I've listed for the Court have well-recognized effects adversely on sexual functioning. Included would be Abilify, Atenolol on occasion, Gemfibrozil which I didn't

know until I did a literature search on the subject, Lisinopril and Terazosin infrequently, Trazodone frequently and Effexor pretty frequently all have an affect on the physiologic aspects of sexual functioning; i.e., anyone taking these medications alone or in combination runs the risk of experiencing an adverse effect of sexual dysfunction.

Q In your opinion why is sexual functioning an important factor to consider in determining whether Mr. Comstock is sexually dangerous?

A Again, let me preface this by saying I offer no such opinion yea or nay on the subject of dangerousness.

Having some passing familiarity as a clinician in terms of normal and abnormal sexual functioning the Court has already heard a great deal about the fact that sexual behavior is comprised of an emotional component which can be very healthy or very unhealthy and a physiologic component which can also be very healthy or very illegal.

That said, if one looks at the processes, the steps -- again I'm referring to a

normal physical being -- the steps involved leading up to and encompassing any sexual conduct or behavior that there are multiple compartmentalized components of that behavior. Interruption in any of those can result in a substantial reduction in libido and sexual behaviors.

A perfect example is that if an individual is just sick they may love their spouse very much. They may still have that emotional connectedness, but the manifestation of that relationship and emotional connectedness through sexual behavior may fall completely off the scope. That does not mean they are not having their emotional needs met through their partner, but rather -- not that this is not a problem -- that the manifestation and expression of that emotional connectedness may cease to occur through the expression of sexual behavior.

That some individuals would say -- they would be incorrect -- is also a part of normal aging and it is not. If you look at the research on the subject some -- if you look at individuals not that much older than the respondent -- less than half -- say 75, 85 -- I may have the ages

wrong here -- it seems like if I'm recalling correctly it was only 39 percent or so that reported still having a very active and fulfilling sexual -- in the 75 to 85 year old age group 39 percent of men versus 17 percent of women reported being sexually active. It does not mean that they are not having their emotional needs met; it means that something else is interfering with the physical sexual expression of that relationship.

Q Notwithstanding your limited purview what did you conclude with respect to Mr. Comstock?

A He has a number of factors both chronically -- these medical conditions I've been talking about they are known -- it's not like you get diabetes and you have a sexual impact of that. It's more like you get diabetes and the longer you have diabetes the risk of adverse sexual impact compounds over time. That can be influenced by successful management and treatment for the condition, but of those conditions cardiovascular disease, diabetes, the prostate cancer -- any of those conditions the longer they are present the greater the risk and the greater the impact will

be physically on sexual functioning.

He has a number of risk factors that if you look at each one independently you say this is a risk factor, this is a risk factor -- taken as a whole they have an additive effect. I'm not saying one plus one equals two, but medically as a physician I can tell you the greater the number of risk factors you have the greater the overall risk is for adverse functioning.

While I have not personally examined Mr. Comstock other than seeing him here in court his risk factor just simply based on advanced age and on the combined and chronic influence of the numerous medical conditions he has and on the combined influence of the medications he needs to take all place him at considerable risk of having a greatly reduced libido interest. His libidinal urges compared to Mr. Comstock 30 years ago would be expected to be less.

There is evidence to suggest at least by risk analysis that his physiologic ability to function normally in various physiologic realms of sexual functioning would be impaired as well, and to the extent that is seemingly confirmed by his own report I read in testimony that he has not had

any erections spontaneous or otherwise within the last year which is not a normal finding.

Q You noted just now that you have not met Mr. Comstock before seeing him in court. You have mentioned a few of your observations of him in the courtroom. Have you observed anything else about Mr. Comstock?

A Dr. Owens in the Bureau of Prison's records describes him as rather frail. He is not a spry individual.

Do any of those observations make it impossible for him to engage in the type of illegal conduct that the Court is here to consider? Nope, they do not. Nor is it my opinion that he would be physically incapable of offending and damaging a child as a result of his libidinal urges.

He is certainly an individual who both on paper and by observation can be, I think, reasonably described as rather frail and showing his age to be exactly that. He is an old, sick, frail individual with numerous chronic medical complaints who, by the way, has had excellent care in the Bureau of Prisons. I've been impressed how well they have managed him.

Q Is there any evidence that you found in the medical records that you reviewed that shows that Mr. Comstock's sexual urges are stronger than those of the average person?

A I'm not aware of that. I'm not an expert in this area. It begs the question how do you quantify -- what kind of lab test do you get to quantify sexual urges.

I am independently not aware of any evidence or research demonstrating that. If there is evidence to suggest that I would love to know how they did that.

Q Is there any scientific data that you're aware of that shows that pedophiles in general have stronger sex drives than people who are attracted to adults?

A I heard people say that in this courtroom, I think. I don't understand how that question could ever be answered scientifically to be honest with you.

I'm a psychiatrist and we specialize in the realm of the unobservable. I don't see how you can define that.

Q If Mr. Comstock is self-reporting that he is having decreased libido is that consistent

with what you have reviewed?

A Yes.

Q If Mr. Comstock came to your office wanting to get treatment for sexual functioning would you treat him?

A Do you mean physiologic functioning?

Q Yes.

A No, and I don't think any doctor should. There's a reason that drugs like Viagra are some of the most commonly prescribed medications in the United States.

Medical care has enabled us to live long, healthy lives -- much older than we did decades ago. As a result the longer men live the higher the incidents of erectile dysfunction. By the way, when a man begins to experience erectile dysfunction it has an independent adverse effect on libido.

These medications are used very effectively in treating ED and have very substantial side effects. Mr. Comstock suffers from medical conditions that would serve, in my view, as an absolute contraindication but certainly a relative contraindication they can hurt him or kill him.

Q You heard Dr. Phenix and Dr. Demby testify that Mr. Comstock is sexually dangerous despite his age and medical condition. Do you disagree?

MR. ROYSTER: Objection. It's clearly outside the scope of his expertise and what he's testifying about.

THE COURT: I'm not sure he even would answer that question.

THE WITNESS: I wouldn't.

THE COURT: He started off by saying he wouldn't. I don't think we have to even discuss that. His whole premise that he started off with was that wasn't the ultimate question he could answer.

THE WITNESS: That is correct.

BY MS. SHEA:

Q As a physician do you use, review and study research?

A I do.

Q In fact, have you received any awards for your research?

A Yes, I have.

Q Can you tell the Court about that?

A During my training the Medical College

of Georgia has a research competition for their trainees where we basically develop a research topic, develop a protocol and hopefully bring that protocol to completion if we're able to do so.

I entered that competition two years. It's called the Hurley-Gleckly competition. That was in Augusta where I trained. At any rate, in 1995 and 1996 I entered that competition and won that competition for the research that was done.

Q As a medical professional do you analyze research methodology?

A I do. In fact, in medical school one of the courses we have in the first two years of medical school focuses on aspects of medical research and use of medical research and clinical practice and medical statistics as well.

Q Did you review the methodology employed by the other experts in this case?

MR. ROYSTER: Objection.

THE COURT: He can testify whether he reviewed it or not.

THE WITNESS: I did.

BY MS. SHEA:

Q Can you tell the Court your observations?

MR. ROYSTER: I'll object.
THE COURT: Observations in relation to what?
MS. SHEA: Observations strictly related to the methodology.
THE COURT: Methodology as it relates to the medical condition and the prescriptions and so forth?
MS. SHEA: We would like him to discuss the strength of methodology generally.
THE COURT: Tell me one more time.
MS. SHEA: Methodology of the research that the other experts used in the case.
THE COURT: The underlying research that they used in order to come up with their opinion. The question is is he familiar with that research?
MS. SHEA: Has he reviewed it.
THE COURT: That's fair.
THE WITNESS: Yes, I have.
THE COURT: Your next question is?
MS. SHEA: What were your observations?
THE COURT: In relation to?
MS. SHEA: The methodology.
THE COURT: He may testify as to that.

THE WITNESS: In the scope of my practice as a person who treats patients and in terms of other aspects of my forensic practice where I'm much more involved the use of medical research both in terms of actuarial analysis and other forms of statistical analysis those areas of research -- I'm not even talking about the research the Court has heard about -- those areas of research are very useful in clinical practice in many ways.

Actuarial analysis comparing patients against known factors in medicine can be very helpful in a lot of ways. It helps us understand what causes illness. It also helps us devise treatment plans for individual patients by recognizing those risk factors for illness that are either protective or aggravating factors so that by analyzing and understanding what those risk factors are we can design a treatment plan to jump on it.

For example, for ten years I ran an inpatient unit that treated individuals with dual diagnosis. Part of my job as medical director for that program was to devise the treatment program and in doing so we did literature research through

organizations to look at what works best. The way they define that to some extent is by looking at the population of those similarly ill individuals in the world so that can be very useful.

Now, crossing that barrier in the fields of forensic analysis of an individual with this same research can be very dangerous and let me explain what I mean by that. I'm going to use another area of forensic medicine.

In psychiatric medicine one of the things that I am called to do is to testify in civil commitment hearings. I'm called in civil actions to assess fitness for duty in terms of looking at dangerousness.

One of the things that I as a forensic psychiatrist and other psychiatrists I know in the field -- you've probably heard this -- psychiatrists are not good at predicting dangerousness. This research is a prime example of the limitations that we experience in doing so.

What you will see if you look very closely -- the Court has actually heard this -- while we can identify the groups of people that are at risk of -- let's say mentally ill substance abusers as a whole might be at an elevated risk of

engaging in criminal conduct as compared to those that aren't substance abusers that are mentally ill -- that's true actually. Yet if you try to assign that risk and utilize that risk assessment on an individual case what happens is that you run the risk -- I think the Court has heard it in this case -- you run the risk of having a very high number of what we term false positives.

MR. ROYSTER: Objection. I don't think he's qualified to get into this testimony. Secondly, it's outside the scope of his report.

Our position would be this is the kind of testimony that is surprising enough that we're not able to deal with it and it should be stricken.

THE COURT: It's very interesting and I think he's qualified to testify but it's outside the scope of what you have asked him to testify about. You filed your documents and have limited his testimony.

I would love to hear it maybe one day, but it's beyond that which you have called him for today.

MS. SHEA: During Dr. Corvin's deposition these are areas that Mr. Royster did

explore with him in his deposition so we didn't really think that we were catching him fully off guard.

THE COURT: I have not read his deposition. I have read his report and I've also read the pretrial statement here. I can't say what happened at the deposition.

MS. SHEA: We respect your ruling. If you want to ask him any further questions --

THE COURT: Not right now because I would be opening a Pandora's box. I'll be handling these cases for quite a few months.

Anything else?

MS. SHEA: No further questions.

THE COURT: Counsel?

MR. ROYSTER: Thank you, Judge.

CROSS EXAMINATION

BY MR. ROYSTER:

Q Good afternoon Doctor. Thank you for your patience as you sat through the last couple days with us.

You testified about peripheral perfusion. That is something that can impair

sexual functioning and libido, right?

A It can.

Q You testified on direct that you didn't personally examine Mr. Comstock, right?

A I have not.

Q That is one of the areas that a personal examination would have assisted you is in determining the extent to which his peripheral perfusion would have affected his impairment and libido.

A True.

A review of his medical records helps, but in a perfect world I might have taken him and in fact not only personally examined him but had a physician in internal medicine look at him as well.

Q You can't testify to the extent which his peripheral perfusion has impaired his functioning or libido, can you?

A That's right.

Just like with these other areas, while it runs the risk I'm remise in assigning that damage directly to him individually because I don't know that.

Q His chronic mood disorder, that can

affect his libido; right?
A It can.
Q A personal examination would have assisted you in determining the extent to which a chronic mood disorder would affect his libido, right?
A I agree, yes.
Q You agree that some people engage in sexual conduct for reasons that are not sexual at all, right?
A While it involves physiologic sexual functioning all sexual conduct is not predicated on the same urges.
Q The motivation is not sexual gratification.
A It is an accepted theory, if you will, that for example many sex offenders are motivated not by what you and I -- I'm not trying to be difficult here -- it's mincing words in a sense. It's how you define sexual gratification. There's the physiologic gratification of experiencing an orgasm versus the gratification of a hate, anger-driven rapist hurting a woman by raping her which obviously has nothing to do with Mr. Comstock.

Q You heard Mr. Comstock testify yesterday and he's not either one of those. He testified, didn't he, that he was not motivated by sexual gratification for dozens of his victims, right?

A I heard him testify to that effect. The emotional connectedness was an important component for that.

Q He doesn't have any of the elements of the hate and the anger and inflicting harm on his victims.

A In terms of psychopathy there's really no history behaviorally or otherwise to suggest that he's that type of a predatorial harming and hating individual if you will.

Q You agree don't you, Dr. Corvin, if something else is driving his interest in these children other than sexual gratification it may not matter whether his libido is decreasing, isn't that true?

A I think that's true. It's an important point you make.

Q That's what you testified to at your deposition, right?

A That's true.

If he is having his emotional needs met through the expression of physical sexual connectedness that component still requires other components but I think what you say is a valid point; that to the extent his physical health impairs his ability to act sexually that if the emotional needs -- the need for nurturing -- the emotional connectedness is an important step in setting the first step, if you will, in the sequence of events that ends in a sexual offense then the illus in and of itself does not negate the need for that connectedness.

I would add that while I agree very much with what you said it takes all of those measures to line up a sexual offense.

That being said, let me play the psychiatrist on both sides of the fence. I also agree with what your experts have said which is that despite his medical conditions that doesn't mean that he could not be motivated to and actually engage in a sexual offense. I don't have an opinion one way or the other on that.

Simply stated it's my view that his overall general medically debilitated condition makes it less likely that psychologically he would

engage in those acts.
Q It's not your opinion that he can't have sexual urges for children.
A No.
Q It's not your opinion that he could not have sexual urges period.
A No.
Q You cannot say whether he is at risk to reoffend. That's not what you're here to do, right?
A I have no opinion on that.
Q What you're saying is it's not that he's at no risk it's just that it's possibly reduced because of everything he has going on with him.
A We seldom speak in absolutes. Whenever a psychiatrist does you can be guaranteed they're wrong. You're right, I'm not saying no risk.
Q You heard his testimony and you heard the testimony of the experts about the kinds of activities he was engaging in which primarily involved fondling young boys, right?
A Correct.
Q Clearly while he has these medical conditions he's still able to use his arms and

move around such that he could fondle boys if he had the opportunity.

A Yes, if he were so motivated to do so and the opportunity were to present itself and he chose to do that -- chose is a loaded word as well -- physically he could engage in that sort of conduct.

Q You mentioned on direct that as one ages their functioning libido and their physiological functioning decreases.

A Tends to.

Q The research that you cited was that approximately 40 percent of men over 40 have or report impaired sexual functioning.

A The term was some level of impaired sexual functioning, yes. It seems high to me, but that's what it says.

Q Mr. Comstock was 58 years old when he was still fondling little boys.

A You're absolutely correct.

Q He may still have had decreased libido but it didn't stop him in offending, right?

A That's a good point. If you put the two together it's possible. At 58 he would have fallen in that 40 or 50 percent and had some

impaired interest or functioning and yet reoffended. That is possible, yes.

Q In fact, he had already had a stroke by the time he was continuing to offend, right?

A That's correct.

Q Based on his testimony and what you have also heard there were a number of offenses even after he suffered that stroke, right?

A I'll have to tell you I'm unclear where my mind is on what the number of the offenses were. With that uncertainty yes, I agree with that statement.

Q While he's been in prison he's had a heart attack.

A Yes.

Q That was in 2006.

A I think it was 2006.

Q The prostate cancer that was in 2007 roughly, right?

A It was 2007.

Q The radiation was in 2007, right?

A December I think.

Q Even after a stroke -- the diabetes has been there for quite some time, the hypertension has been there for some time.

A Right.
Q He's been on these medications for some time.
A Right.
Q All prior to 2008, right?
A Yes.
Q With all these things going on including the prostate cancer and the radiation he still in June of 2008 is stockpiling pictures of little boys, isn't that true?
MS. SHEA: Objection, Your Honor. He testified he didn't review those records.
THE COURT: If he knows.
BY MR. ROYSTER:
Q You sat through the testimony all day yesterday, didn't you?
A I did.
Q Did you hear the testimony about all the photographs that were found in prison in his cell?
A I did. I didn't see the photographs but I'm aware of them.
Q You're aware of them from being here yesterday and today.
A Correct.

Q That event happened after all these other health conditions and even all the medications that you talked about, right?

A Yes, but let's not make the assumption --

Q I understand you haven't seen the pictures.

The point I'm only making, Dr. Corvin, is that event happened after he had suffered all these conditions and even after his prostate treatment and his prostate cancer, correct?

A Correct.

I think it's worth saying in response to that -- I think the Court has heard testimony -- I as a physician draw a big difference between a man finding an individual -- whether that be a boy or a woman -- sexually attractive different than saying -- let me give you an example since my wife is not here.

If I am driving down the road and I see a billboard and there may be some attractive models on it I may note that is an attractive woman. That does not necessarily put me at risk as an individual given my own psychological make-up of pursuing that woman or another woman or

going and committing a rape or doing anything.
I don't mean to imply that it's my opinion that he can have no appreciation of the fact that he throughout his entire adult life has found these ten to 14 year old prepubescent boys as attractive. I think that was the word he used.
I haven't seen the pictures. I think it's safe to assume that they weren't viewed as in and of themselves pornographic or other charges would have been forthcoming related to that.
Q That's clearly speculation on your part.
A It absolutely is. I worked and lived for a lot of my career in the building where he is now. It is speculative on my part.
MR. ROYSTER: Thank you, Judge. We don't have any other questions.
THE COURT: Defense, any further questions?
MS. SHEA: Yes, Your Honor.

REDIRECT EXAMINATION

BY MS. SHEA:
Q Dr. Corvin, in your cross examination

you mentioned a distinction between finding someone attractive and pursuing that person sexually. Can you elaborate on that distinction?

A Sure.

Most human beings may note other human beings as attractive, sexually interesting, pique their curiosity if you will. In the vast majority of those instances no overt behavioral anomalies result -- in the very vast majority of those instances.

I'm not talking about in the case of Mr. Comstock or in the case of pedophilia in general, but simply finding otherwise legal images of young boys attractive or even sexually attractive while certainly consistent with pedophilia -- I don't mean to defend that in any way, shape, form or fashion -- but that in and of itself does not equate in my view with a pronounced risk of then engaging in overtly violent or dangerous sexual conduct.

Q Mr. Royster also mentioned to you that Mr. Comstock had a stroke at age 39.

A Right.

Q Do people tend to recover more quickly when they're younger versus when they're older?

A Yes. From that and other medical conditions as well, yes.

Q Since Mr. Comstock has been incarcerated at the age of 58 what medical conditions has he suffered from?

A The treatment that at least was initiated while he's been in custody or continued was for the high blood pressure, Type 2 diabetes, prostate cancer with radiation therapy -- presumably in remission -- although he has suggested perhaps not -- he had a posterior wall myocardial infarction with evidence of a peripheral perfusion problem resulting from that. He's had a lot. He's 69 and less healthy than many 69 year olds.

MS. SHEA: No other questions, Your Honor.

THE COURT: Anything further?

MR. ROYSTER: No, Judge.

THE COURT: Thank you very much, Doctor. We appreciate it.

We'll adjourn until 2:00 because I know an hour will not be enough time for everybody to get lunch.

(Luncheon recess.)

THE COURT: Can we please have the next witness?

MS. GRAVES: We would ask if Dr. Corvin could be released.

THE COURT: Absolutely. Any objection?

MR. ROYSTER: No objection.

THE COURT: He could have been released before lunch. I suspect we'll see each other again. We have a lot of these cases.

MS. GRAVES: We call Dr. Terence Campbell.

TERENCE W. CAMPBELL, Ph.D.,
was sworn or affirmed and testified as follows:

THE COURT: If you could give us your full name and spell your last name I would appreciate it.

THE WITNESS: Terence Campbell. T-e-r-e-n-c-e C-a-m-p-b-e-l-l.

THE COURT: Thank you Doctor.

I see you're from Michigan. Hopefully while we're all down here we'll get some nice

weather.

Counsel, you may proceed.

MS. GRAVES: Thank you, Your Honor.

DIRECT EXAMINATION

BY MS. GRAVES:

Q Dr. Campbell, can you hear me okay?

A Yes. You're coming through loud and clear. Thank you for asking.

Q Would you please tell the Court some things about your professional background?

A I completed my Bachelor's Degree Cum Laude in 1965 at Western Michigan University majoring in psychology and sociology.

THE COURT: When I was a state Judge I had a court officer -- we have a Western graduate here, too -- I had a court officer who went to Michigan State but he spent a little time at Western -- whenever anybody said they went to Western or Michigan State I would say oh, must have been a good drinker. Jennifer went to Western.

THE WITNESS: I completed my doctoral degree in human development and clinical psychology at the University of Maryland in 1970.

I have done additional post-doctoral training in family psychology and family therapy during the academic year 1984/1985 at the University of Rochester Medical School located in Rochester, New York.

BY MS. GRAVES:

Q Do you have any board certifications?

A Yes.

I am board certified in forensic psychology by the American Board of Professional Psychology. There's only about 250 of us nationwide who are so certified in that specialty.

Q What does it take to become board certified in forensic psychology?

A First of all you have to apply with your application. You have to satisfy requirements for education, training and experience. If you have sufficient education, training and experience you move on to the next step. Only about 50 percent of candidates survive that first step the first time they apply.

The next step is a written examination. Only about 50 percent of the remaining candidates passed the written examination the first time around. If you pass the written examination then

you undergo an oral examination where you are examined by three other diplomates who share your specialties within forensic psychology. For the remaining candidates only about 50 percent of those remaining candidates pass the oral examination the first time around. Fortunately I passed everything the first time around.

Q I see that you've done a lot of post-doctoral training. Is there any of it that you would like to highlight for the Court that is particularly relevant to this case?

THE COURT: You're looking at Exhibit 3?

MS. GRAVES: Yes.

THE COURT: No problem. I have it here. I'm following along with you.

BY MS. GRAVES:

Q I'm referring to your Curriculum Vitae.

A I already mentioned the post-doctoral training at the University of Rochester. Additionally I did training in structural and strategic family therapy. I've done specific training in the use of the Psychopathy Checklist Revised.

I probably should have kept better

track of my training. I'm embarrassed to say the Michigan Board of Psychology has no continuing education requirements for psychologists.

THE COURT: I'm well aware of that.

THE WITNESS: As a result I don't always keep as good a track as I should keep track, but as a member of the American Psychological Association and the American Psychological Society and the American Psychology Law Society I have continually attended and involved myself in training opportunities related to actuarial assessment, risk assessment in general, diagnostic endeavors and I have also been in a position where I have been teaching workshops in these areas.

BY MS. GRAVES:

Q I noticed beginning at page three you published a number of books and articles.

A Yes.

Q Are any of them of particular note regarding this case?

A Yes.

The first book that's applicable to this matter is the book originally published in December 2001 with my colleague Demosthenes

Lorandos titled Cross Examining Experts in the Behavioral Sciences. That came out in 2001. Beginning in 2003 and every year after that we do an annual update of Cross Examining.

What Cross Examining does is it teaches attorneys the necessity for psychologists relying on psychological science when they testify in legal proceedings, and the necessity of relying on psychological science when testifying in a proceeding such as this one is clear and evident.

Also, in 2004 I wrote Assessing Sex Offenders-Problems and Pitfalls. That was the first edition. Then in 2007 I wrote Assessing Sex Offenders-Problems and Pitfalls, Second Edition.

Q Then there are a number of professional articles that you've authored.

A Yes.

Q Are any of those of particular relevance in this case?

A Yes, many of them are relevant. Probably the single most relevant article is not there because it was published in June of 2011. If we're counting it's article number 50. That article is titled The Predictive Accuracy of the Static-99R and Static-2002R.

Other articles that are directly relevant and applicable to this proceeding is the Campbell and DeClue 2010 article titled Maximizing Predictive Accuracy in Sexually Violent Predator Evaluations. Article number 46, Campbell and DeClue, 2010, Flying Blind with Naked Factors: Problems and Pitfalls in Adjusted-Actuarial Sex Offender Risk Assessment.

There are still other articles that are relevant, but the three that I have just identified are the most recent and most directly relevant articles at this time.

Q What sort of practice do you have?

A I am self-employed specializing in forensic psychology.

Q As part of that practice do you also conduct forensic evaluations?

A Yes, I do.

Q Have you conducted any evaluations regarding the Adam Walsh Act?

A Yes, I have.

In terms of evaluations pursuant to the Adam Walsh Act this would be my fourth evaluation.

Q Have you also conducted forensic evaluations regarding civil commitment for

sexually dangerous persons in state proceedings?
A Yes, I have. I've done those evaluations in the States of Washington, California, Wisconsin, Iowa, Missouri and Florida.
Q Over what period of time?
A Over a 13-year period of time. I think the first one I did was in 1998.
Q About how many do you think you've done?
A I would say approximately a hundred all totaled.
Q Have you testified as an expert in those various states?
A Yes.
Q Have you testified as an expert in federal court regarding the Adam Walsh Act?
A Yes.
MS. GRAVES: Your Honor, at this time we would tender Dr. Campbell as an expert in the field of forensic psychology.
THE COURT: Any voir dire or any objection?
MR. ROYSTER: No objection and no voir dire, Your Honor. Thank you.
THE COURT: You may proceed and you may

testify as an expert.

MS. GRAVES: Thank you, Your Honor.

BY MS. GRAVES:

Q Dr. Campbell, how did you become involved in the case we have here of Mr. Graydon Comstock?

A As I recall it, Ms. Graves, you contacted me over the phone. You verbally outlined the case. I indicated to you that I would like to review more information. You sent me the October 2006 report of Dr. Hernandez, the February 17, 2011 report of Dr. Demby and the April 2011 report of Dr. Phenix.

Q Did you receive some other documents after that?

A Yes, Bates numbered documents that would add up to approximately 2000 pages; plus an additional report from Dr. Phenix corresponding to her in-person interview of Mr. Comstock.

Q What were you asked to do?

A I was asked to assess Mr. Comstock and view the Adam Walsh criteria. Specifically I was to determine whether or not Mr. Comstock is sexually dangerous to others in that he suffers from a mental illness, abnormality or disorder.

I was also asked to determine as a result of the presumed serious mental illness, abnormality or disorder would Mr. Comstock have serious difficulty in refraining from sexually violent conduct or child molestation if released.

Q As part of that evaluation did you interview Mr. Comstock?

A Yes, I did.

Q Did you write a report?

A Yes, I did.

Q At tab four of the respondent's notebook is that the report that you compiled?

A Yes.

To be precise, if you go back to tab one that's like a Table of Contents for my report.

THE COURT: Do you mean page one of your report?

THE WITNESS: Yes.

Page one is the beginning of what I call an outline summary or like a Table of Contents.

THE COURT: The top right-hand corner has an exhibit label four so we're on the same page.

THE WITNESS: I don't have the exhibit.

THE COURT: You don't have the exhibit in front of you. That's fine.
BY MS. GRAVES:
Q Do you have the book?
A All I have to do is look down.
THE COURT: If you would rather work off of your own copy that's perfectly fine as long as we're all working off the same copy.
You can take a look at tab four, or you can use your report as long as it's the same thing.
THE WITNESS: I'm to go to tab four?
THE COURT: Yes, and then you'll see your name up there. It's the other book. There's two books. They're identical except on the front of the government's it has a seal.
MS. GRAVES: May I help him?
THE COURT: Yes, please.
THE WITNESS: Now we're literally and figuratively on the same page.
THE COURT: If you prefer to use your copy you're welcome to as long as it's the identical thing that's in the book.
THE WITNESS: I will rely on my copy to some extent, but always referring to the

pagination from Exhibit 4 in the exhibit book.

THE COURT: Thank you.

BY MS. GRAVES:

Q Is the exhibit at tab four the report that you prepared in connection with this case?

A Yes, it is.

Q Could you look at tab five and tell me if you can identify that as the Relapse Prevention Interview that you conducted in this case?

A Yes. That's exactly what it is.

Q And then at tab six would that be the notes that you took in this case in conducting the structured clinical interview of Mr. Comstock?

A Correct.

Q Now let's turn to the evaluation itself. You said you were asked to answer three questions, is that right?

A Correct.

Q The first of those questions is whether Mr. Comstock had committed acts of child molestation or sexually violent conduct, is that right?

A Correct.

Q What was your answer to that question?

A Yes.

Q What did you find?
A Going back in time --
THE COURT: You may direct your attention to that if you want. I don't think there is any dispute on either side as to that. I think the first two there's no dispute.
MS. GRAVES: Yes, sir.
THE COURT: You can ask him just to make sure that he's on the same page.
MS. GRAVES: Exactly.
THE COURT: I don't think you have to go into it too much.
BY MS. GRAVES:
Q As to the second question whether Mr. Comstock suffers from a serious mental disorder can you answer that question?
A My answer would be yes.
Q What was that disorder?
A Pedophilia.
THE COURT: For the record as well as the government nobody disputes that. There's no dispute by either side.
MS. GRAVES: Thank you, Your Honor.

BY MS. GRAVES:

Q Let's turn our attention to the third question. What's the third question you were going to answer?

A As a result of a serious mental illness, abnormality or disorder would Mr. Comstock have serious difficulty in refraining from sexually violent conduct or child molestation if released.

Q What was your answer to that question?

A No.

Q How did you go about addressing that question?

A I went about addressing that question first of all in terms of assessing the issue of serious difficulty in controlling his behavior.

Psychologists would recognize impulsivity as amounting to serious difficulty in controlling one's behavior. As a result I administered the Barratt Impulsiveness Scale to Mr. Comstock to obtain objective data indicating whether or not he can be considered impulsive.

The objective data that I obtained via the Barratt clearly indicate no; Mr. Comstock is not an impulsive person. He is not the kind of person who rapidly acts without thinking first.

Q Do you consider impulsiveness to be the only measure of whether someone has volitional control?

A No.

I think in terms of necessary and sufficient distinctions. For example, oxygen is necessary to sustain human life but in and of itself it's not sufficient. We need warmth, we need food, we need shelter to sustain human life.

Correspondingly impulsiveness is a necessary condition of volitional impairment but in and of itself is not sufficient. Volitional impairment also, for example, necessitates well-defined stimuli that will provoke impulsive behavior.

The bottom line being because impulsiveness is a necessary condition for volitional impairment if there is no impulsiveness there is no volitional impairment.

Q Tell us more about the Barratt Impulsiveness Scale.

A Let me turn to the appropriate area of my report.

Q Will you refer us to what page you're going to?

A I am on page ten and flipping over to page 11.

The Barratt Impulsiveness Scale is arguably the most commonly administered self-report measure specifically designed for the assessment of impulsiveness. The Barratt scale has different norm groups.

THE COURT: You're on page --

THE WITNESS: I'm now over on page 11.

THE COURT: I got it.

THE WITNESS: I am sorry.

THE COURT: You're talking about at the top.

THE WITNESS: Yes.

BY MS. GRAVES:

Q Use the page you're comfortable with.

A If I can use the pages with which I'm comfortable I'll be referring to the pagination in my own report.

THE COURT: The record will reflect that is part of Exhibit 4, but it's on the top as opposed to the bottom. We'll all work off the same one.

THE WITNESS: The Barratt Impulsiveness Scale has undergone peer review. It provides

different norm groups for comparison purposes. For Mr. Comstock I selected a norm group of prison inmates and compared to a norm group of other prison inmates Mr. Comstock scored far below the cutoff for high impulsiveness. The cutoff for high impulsiveness is a score of 74 and Mr. Comstock scored 52. That would put him in about the fifth percentile. That is to say, 95 percent of incarcerated inmates taking this test would score higher on the Barratt than Mr. Comstock did.

BY MS. GRAVES:

Q In your view Mr. Comstock is not an impulsive person.

A Correct.

Q Does that cause you to conclude that he does not suffer from the impairment of his volitional control?

A It leads me to conclude that it is unlikely that he suffers from impairment of volitional control; but then in addition to that I also wanted to do the structured clinical interview to see if there was any evidence of another personality disorder applicable to Mr. Comstock. In addition I also wanted to do the

Relapse Prevention Interview to assess Mr. Comstock's volitional controls.

Q Why is volitional control important to this question of whether he would have serious difficulty in refraining from child molestation?

A Serious difficulty equates to a breakdown in volitional control where there are some sex offenders that in the presence of particular stimuli they cannot control their behavior and instead they act out impulsively.

The objective data say that Mr. Comstock does not fall into that class of offenders that I just described.

Q I believe there was testimony earlier that if someone commits the act itself of child molestation committing the act demonstrates a lack of volitional control. Do you agree with that?

A No, not at all.

We can have people who sexually abuse children and go about it in a very planned, careful, deliberate manner and at any step along the way they could stop if they wanted to but they choose not to.

Q In your estimation the question whether someone has serious difficulty refraining goes to

the person who -- not the person who chooses to not stop but the person who cannot stop.

A Correct.

Q Does that mean that the person absolutely cannot stop? How do you see serious difficulty along that scale?

A First of all your question identifies the answer -- how do you identify difficulty along this scale -- you're right, it's a continuum.

Then we can have a situation where for the offender whose behavior controls break down because of volitional impairment the closer he gets to his goal of abusing the child the more intense his impulses are and the more difficult it becomes for him to stop. If he's many steps away perhaps he could stop, but if he's getting closer and closer and closer with the breakdown of volitional control he can't stop.

On the other hand, if we have an offender whose volitional controls are intact at any point along the continuum of the step-wise progression and proceeding to sexually abusing a child that offender whose volitional controls are intact can stop himself. If he anticipates being apprehended he can stop himself.

Q Do you see serious difficulty in refraining as a psychological term of art or does it have some other meaning?

A I think it is a legal term which myself and other psychologists have interpreted psychologically.

Q So you're comfortable offering an opinion on it.

A Yes, I'm comfortable offering an opinion on that issue expressing it in terms of impulsivity, relying on the objective data that I obtained from the Barratt Impulsiveness Scale therefore reducing to about zero my reliance on clinical judgment.

Q Have you used the Barratt Impulsiveness Scale in other Adam Walsh cases?

A In all of them.

Q Did you also use it in some of your state cases or all of your state cases?

A Yes. I've used it continually for about the past four to five years.

Q Do you know whether other forensic psychologists use the scale?

A Yes, there are other forensic psychologists who also use the Barratt.

Q What other methods or factors did you consider in your assessment of Mr. Comstock?

A I used the structured clinical interview for personality disorders to assess does Mr. Comstock satisfy diagnostic criteria for personality disorder. A personality disorder is defined as a long-term maladaptive enduring personality style.

In terms of the structured clinical interview for personality disorders it became clearly evident no, Mr. Comstock does not satisfy diagnostic criteria for any personality disorder.

Q Why would it matter whether he suffered from personality disorder?

A Because the relevant statute clearly asks as a result of the serious mental illness -- excuse me -- does this individual suffer from a serious mental illness, abnormality or disorder and a personality disorder is a serious mental illness.

Q After you ruled out personality disorders what else did you do?

A Then I assessed Mr. Comstock's risk of sexual reoffending using the actuarial instrument we've been talking about -- the Static-99R.

Q How does the actuarial assessment tie into the question that's before the Court?
A The question of serious difficulty in refraining from sexually violent conduct or child molestation if released -- quite simply as a psychologist that question asks me what is the risk of this offender reoffending sexually.
Q Is it possible for a psychologist to say with certainty whether Mr. Comstock will or with not reoffend?
A No. The best we can do is express his risk of reoffending in percentage terms and say compared to a group of previously convicted sex offenders this is the risk expressed in percentage terms of Mr. Comstock reoffending over a five-year period of time.
Q I think you said you used the Static-99R, is that right?
A Correct.
Q Why did you chose that particular instrument?
A Because there is peer reviewed data authored by me and my colleague Dr. DeClue allowing me to specify with considerable precision what is the risk for any offender of sexual

reoffending given a particular Static-99R score. Given a score I could say his risk of reoffending over a five-year period of time, for example, is X percentage.

Q Explain first what peer review is.

A Peer review is a process of quality control in the publication of scientific material.

The most recent articles I published when they underwent peer review the editor in chief of those articles sent the articles to three members of the journal's editorial board who are familiar with the topic that I'm writing on and then independent of each other each of the three editorial consultants reviewed the manuscript, expressed observations, made recommendations for changes or changes to be considered and then made recommendations such as excellent article, publish as is; very good article but it needs some revision; could be a good article but it needs considerable revision or no, this article should not see the light of a publication day because it amounts to junk science.

Q Tell the Court how Static-99R works.

A Static-99R is the latest iteration of the original Static-99. The original Static-99

became available in February 2000. They missed 1999 by a couple of months.

The original Static-99 was developed by Carl Hanson and David Thornton. The original Static-99 had a sample of 1086 previously convicted sex offenders. About half of those offenders were from Canada and the other half were from the United Kingdom. Those offenders were followed over a 15-year period of time and 52 percent of those offenders were known to sexually reoffend. Specifically -- excuse me. I misspoke.

For the whole sample approximately 25 percent of those offenders reoffended. Approximately 252 of the total sample of 1086.

The original Static-99 was scored from one through six and then all scores six, seven, eight were treated the same. They were all treated as six and above.

For offenders who scored six and above 129 of them sexually -- again I misspoke.

129 offenders scored six and above. 67 of them reoffended, 62 of them did not reoffend.

Over the years as the Static-99 was used with increasing frequency it became evident

that there was a major problem with it. It was over-predicted recidivism. In 2008 we saw a new --

Q You said in 2008 there was a change?

A Yes.

There was a change in 2008 with a new development with the Static-99 using two different norm groups. You could compare an offender to a high risk group or compare an offender to a routine group.

This change came about trying to correct for the problem of over-prediction or an excessive number of false positive classifications. Unfortunately it didn't work out as well as intended and one year later we see a whole revision in Static-99 and the development of the Static-99R.

A graduate student in Canada working on her Master's thesis -- her name is Leslie Helmus -- developed a sample of more than 9000 sex offenders and said you need to look at the risk of sexual reoffending in terms of is this a routine offender, is this a non-routine offender, is this an offender who is in need of treatment or is this an offender who by virtue of his history is a high

risk offender. We started out with one set of norms for the Static-99 in the year 2000. We now have four sets of norms for the Static-99R in the year 2011.

Q Is all of this an attempt to improve on just looking at the linear progression?

A Yes. Exactly.

Q When we talk about linear progression we're talking about the correlation between increased recidivism as the score on the instrument increases.

A Yes.

The term psychologists typically use is the Static-99 and the Static-99R are linear additive models; that is to say the higher the score obtained on the instrument the greater is the risk of sexual reoffending.

Q Upon finding that it didn't work out as well is that what caused them to come up with these different groups for comparison?

A Yes.

In her Master's thesis Ms. Leslie Helmus pointed out that the original Static-99 was over-predicting recidivism and that we needed to revise the Static-99 norms to avoid stumbling into

an unacceptable frequency of false positive classifications.

Q How did they determine the norm groups or the sample groups?

A I'm not entirely sure. This is one of the greatest problems with the Static-99R. We have four different norm groups, and we have no well-defined guidance as to which norm group should be applied to which offender.

Specifically do we have well-defined guidance available to us for making decisions about which norm group to apply to Mr. Comstock? No, we do not. If we had would decision making rules about what norm group do you use then we would have adequate inter-rater reliability data.

Inter-rater reliability data would ask for this particular offender or for these particular offenders we have 20 psychologists making decisions about which norm group. Those 20 psychologists are making their decisions independent of each other. To what extent do those psychologists agree what is the appropriate norm group for a given offender.

We express that kind of agreement in terms of a correlation coefficient. Real quickly

correlation coefficients can range from 0.00 with no relationship between two variables whatsoever and up to 1.00 where we have a perfect relationship between two variables.

In a classic paper published in Law and Human Behavior in the early '90s they recommended an acceptable level of inter-rater reliability for any instrument to be used in a forensic setting is .80. That's the level of inter-rater reliability we would want to see for the question of which norm group do you select when you're using the Static-99R. No such data are available.

Q Because there's no data indicating which norm group to apply what do you suggest?

A What I do when I report Static-99R outcomes I explain, one, there are no well-defined decision making rules that I can use to support my selection of one norm group over another therefore I'm going to use all four. Using all four then I will report a range of risk for this offender.

Q Mr. Comstock scored a two on the Static-99R, is that right?

A Correct.

Q Can you tell the Court what that score means?

A I'm trying to find the appropriate page in my report.

The best way to do it is to understand that when we're using and actuarial instrument to assess recidivism risk there are four --

THE COURT: One second.

The two is based upon the average of the four?

THE WITNESS: No. Same score. Everybody agrees. In other words, Dr. Phenix --

THE COURT: Everybody agrees it's a two.

THE WITNESS: Two. The issue is which comparison group do you use.

THE COURT: It's the next step that you average them.

THE WITNESS: Then the question is okay, how do we interpret this score; how do we understand it. Using my pagination I recommend we go to page 25 of my report.

In Category F I talk about computing predictive accuracy. How are we going to identify the predictive accuracy of the Static-99R for a score of two.

We have to understand there's four

possible outcomes. You can have a true positive outcome. The evaluator says as a result of this score I'm predicting that this individual is going to reoffend and in fact he does reoffend.

We can have a false positive outcome. The evaluator says as a result of this individual's score I'm predicting that he will reoffend but in fact the offender does not reoffend.

Thirdly we can have a true negative outcome. The evaluator says as a result of this individual's score I'm predicting that he will not reoffend and in fact he does not reoffend.

Finally there's a false negative outcome that should include a missing S and false negative outcome corresponds to a situation where the evaluator says this offender will not reoffend but in fact he does reoffend.

As a result of my 2011 article published in Open Access Journal of Forensic Psychology we can identify the frequency of true positive/false positive, true negative/false negative outcomes for any Static-99R score using any one of the four comparison groups.

BY MS. GRAVES:

Q Let me try to clarify something first. There are people who score two in every comparison group or every norm group, is that right?
A (No audible response.)
Q You said there were four groups for comparison.
A Right.
Q But there are people who have scored a two in each of those four groups.
A Correct.
Q What you're trying to do then is determine what's the risk for a person who scores a two or what's the rate of recidivism for a person who scores a two in each of those groups.
A Again correct.
Q The question then is which group do you compare Mr. Comstock to and your conclusion is you should compare him to each of those groups.
A That's right, and report a range of risk.
Q What is it that you're getting at with the false positives/false negatives and true positives/true negatives?
A Let's go to page 26 and we'll start

with a routine sample. This is not in the report but I just computed it. In the routine sample there's a total of 2406 offenders in the routine sample alone.

Q This is from the group that was analyzed under the Static-99R.

A Correct.

For a score of two we can interpret it in either of two ways. We can say my position is going to be for any offender scoring two and above on the Static-99R I will rule in recidivism risk.

The other way is I can say my position is for a score of two and below on the Static-99R I will rule out recidivism risk.

Let's look at Category G on page 26 where it says true positive 120.

For a score of two using the routine sample if I say I'm going to predict all offenders scoring two and above on the 99R will reoffend I will have 120 true positives. I will also obtain 1277 false positives. At this point I can compute what's known as the positive predictive value. It corresponds where it says PPV.

Remember I have 120 true positives, I have a total of 1397 rule-in decisions. That's

120 plus 1277. 120 divided by 1397 is .09. The positive predictive value tells us that if you rule in recidivism risk for an individual scoring two and higher on the Static-99R you will be correct nine percent of the time. You will be mistaken 91 percent of the time.

Then we can look at the other decision making alternatives available to us and say for anyone scoring two or below on the 99R I'm going to rule out recidivism risk. Now we want to look at the true negative and false negative outcomes because we're ruling out recidivism risk.

If you say for any score of two and below on the Static-99R I'm ruling out recidivism risk you will have 1320 true negative classifications, and you will have 29 false negative classifications. 1320 plus 29 is 1349. That's the total number of negative classifications. The total number of decisions where you say this guy is not going to do it. You're correct 1320 times so the negative predictive value is .97. You're going to be correct 97 percent of the time when ruling out recidivism risk. You're going to be wrong three percent of the time when ruling out

recidivism risk for a Static-99R score of two comparing that offender to the routine sample over a five-year follow-up.

Q The bottom line is the instrument is better at ruling out recidivism than ruling it in.

A Exactly.

Look at page 26 and look under the column of NPV. We can see the negative predictive values are .97 for the routine sample, .95 for the preselected for treatment sample, .93 for the non-routine sample, .90 for the high risk sample.

For Mr. Comstock ruling out recidivism risk will be accurate for offenders such as himself somewhere between 90 to 97 percent of the time depending upon which norm group you want to look at.

Conversely we can look at the positive predictive values. Positive predictive values are .09, .12, .19, .23. If we rule in recidivism risk for offenders such as Mr. Comstock we will be correct somewhere between nine percent and 23 percent of the time. We will be mistaken when ruling in somewhere between 77 percent and 91 percent of the time.

Q Is there a place where one can go to

see what the recidivism rate is for these various groups?

A I can tell you. There is a place you can go -- Campbell 2011 -- the Predictive Accuracy of the Static-99R and Static 2002-R. I also put that information in my report for five-year follow-ups the recidivism base rate for the routine sample is six percent.

Q Six percent?

A Right.

For the preselected for treatment sample the recidivism base rate is 9.1 percent. That is to say 9.1 percent of that sample reoffended over a five-year follow-up.

Q That's for people with a score of two?

A No. I'm talking now about the entire sample.

Q I gotcha.

A For the non-routine sample the recidivism base rate for that entire sample is 14.8 percent.

THE COURT: What page are you on, Doctor?

THE WITNESS: Page 23.

I have to tell you on page 23 the base

rate data for the routine sample was omitted but I know it's six percent.

THE COURT: Thank you.

THE WITNESS: To complete it, the base rate for the non-routine sample over a five-year follow-up is 14.8 percent. Finally the base rate of recidivism over a five-year follow-up for the high risk group is 21 percent.

BY MS. GRAVES:

Q Is there any way of knowing how similar or dissimilar Mr. Comstock is to the folks in the sample groups?

A No, because the sample groups are not well enough defined that we can identify which sample group applies to Mr. Comstock and make that identification in a consistent manner. Making identification in a consistent manner would necessitate an acceptable level of inter-rater reliability for that decision and there's no inter-rater reliability data available.

Q Would you say that the actuarial instrument is limited?

A Yes.

Specifically it is limited in the sense that it is much more accurate for ruling out

recidivism risk than it is for ruling in recidivism risk.

Q Is it also limited in that it doesn't address Mr. Comstock in particular?

A Correct.

It does not take into consideration, for example, Mr. Comstock's health status. We ask ourselves given what has been described by a physician as a physically frail individual of 68 years of age can we even apply these Static-99R data to him.

Q Nevertheless, is the Static-99R still considered the best risk assessment tool in the area right now?

A If we're talking about risk assessment tools for assessing the risk of sex offender recidivism, yes. If we're talking about actuarial instruments in general no.

I just came upon the most impressive instrument in the past week and it will be used by federal probation officers after they have undergone appropriate training for identifying the post-conviction risk of recidivism for any federal defendant.

That actuarial instrument is premised

on more than 100,000 individuals and that again should give you the impression Static-99R is not doing that hot with 8- to 9000 in its sample when we have an impressive sample of over a hundred thousand offenders which federal probation officers will be using regularly in the near future.

Q You've got the Static-99R which predicts risk but doesn't tailor it to a specific individual.

A Given idiosyncratic characteristics of that individual, no.

Q But it can give you a general assessment based on the score he had on that instrument and comparing him to the people who have the same score.

A Yes.

Q Even with its limitations is it still better at risk assessment than clinical judgment?

A Absolutely. Clinical judgment when assessing the risk of recidivism or future dangerousness is an unmitigated disaster.

Clinical judgment is especially a disaster because it persistently over-predicts future dangerousness. Clinical judgment again and

again walks evaluators into false positive classifications.

Q Even with all that said you made a judgment in this case.

A And what judgment did I make?

Q You made the judgment that he would not have serious difficulty.

A I made that judgment based upon objective data and a structured interview; both of which are inconsistent with clinical judgment.

Q Let's look at some of the other instruments that have been referred to and perhaps even used by yourself. Did your use the Static-2002R?

A Did I use it? No. I know that Dr. Phenix used it. If you go to page 27 of my report I report outcome data for the Static-2002R.

I make typographical errors, also. I think Dr. Phenix made a small typographical error where at one point in her report she typed six for the Static-2002R and I think she meant five.

If you look on page 27 you have to understand for the Static-2002R there's only three comparison groups; routine sample, non-routine sample and high risk sample.

If you look on page 27 referring to my pagination you see the outcomes for the frequencies of true positive/false positive, true negative/false negative for a Static-2002R score of five over a five-year follow-up. There the positive predictive values range from .10 to .27. That means if ruling in recidivism risk relying on a Static-2002R score of five the evaluator will be correct somewhere between 73 percent and -- excuse me -- the evaluator will be incorrect somewhere between 73 percent and 90 percent of the time.

If ruling out recidivism risk saying no, this offender will not reoffend again relying on a Static-2002R score of five over a five-year follow-up ruling out recidivism risk an evaluator would be correct somewhere between 85 percent and 97 percent of the time. Therefore, the margin of error is much, much greater when ruling in recidivism risk vis-a-vis the Static-2002R compared to ruling out recidivism risk.

Q There was also a mention of an SVR-20 instrument. Are you familiar with that?

A Yes, I'm quite familiar with the Sexual Violence Risk-20.

Q I think Dr. Demby used that instrument.

A Yes.
Q What do you know about that instrument?
A That it is a proxy for clinical judgment. It is not an actuarial instrument. There is no way to compute positive predictive values and negative predictive values or is there any way to identify the frequencies of true positive/false positive, true negative/false negative outcomes when relying on the SVR-20.

Moreover the SVR-20 invokes consideration of supposed risk factors that are known not to be correlated with recidivism. Specifically I'm going to page 46 of my report -- excuse me -- I'm going over to page 47 and 48.

For example, the SVR-20 suggests that an offender's extreme minimization and/or denial increases the risk of sex offender recidivism, but at the same time SVR manual acknowledges there is no clear evidence supporting this factor's ability to predict future sexual violence although it predicts general criminality in sexual offenders.

The manual goes on to say according to professional reviews it -- extreme minimization and denial -- it is an important factor to consider in clinical evaluations of risk. That is

entirely and completely irresponsible. What the manual is suggesting is set aside any considerations of empirical accuracy and passionately embrace your clinical judgment again.

Q How about the PCLR?

A What about the PCLR? It's a very, very complex instrument.

The PCLR is a 20-item instrument designed for assessing psychopathy. As Robert Hare -- the originator of the PCLR -- outlined psychopathy involves two different factors. Factor one corresponds to an impulsive individual who demands immediate gratification and acts first without thinking. Factor two corresponds to the kind of individual who in a cold and calculated remorseless fashion will manipulate and use other people.

The whole problem here with the PCLR and this proceeding is Robert Hare himself reports in his manual the PCLR is not a good predictor of sexual recidivism. For criminal offenders younger than the age of 40 the PCLR can be a pretty good predictor of general criminal recidivism but not specific sexual recidivism.

Moreover, Hare points out for offenders

45 years of age and older the PCLR is virtually worthless; therefore if someone has used the PCLR in this proceeding with Mr. Comstock they've demonstrated that they don't pay close attention to the relevant research and authoritative opinion.

Q Finally I think there's the SRA-FV.

A Yes.

This is the structured risk assessment forensic version that Dr. Phenix testified about. In her deposition Dr. Phenix characterized the items of the structured risk assessment as being complicated and I would agree entirely with her.

In her deposition she also characterized the scoring of the structured risk assessment as being complicated, and again I would agree with her entirely.

If we agree that we are using a complicated instrument with a complicated scoring procedure the question becomes one of what are the levels of inter-rater reliability obtained when using the structured risk assessment. To what extent can two or more psychologists evaluating the same offender independent of each other agree in their structured risk assessment findings.

To appropriately use the structured risk assessment in a forensic setting we must have data to answer the question I just posed. Heilbruen has told us we expect a level of inter-rater reliability found in a correlation coefficient of .80 or greater. Then we ask do we have that acceptable level of inter-rater reliability for the structured risk assessment and the answer is emphatically no.

Moreover, I should explain to the Court we don't have any peer reviewed data regarding the structured risk assessment whatsoever. We have one article written by David Thornton. It's a good article. Thornton's article is a good article. It's an important article. In the article what Thornton is talking about is how and why he developed the structured risk assessment and what his hopes and aspirations are for that instrument which is an appropriate thing to write about in the initial stages of developing an instrument; but again there are no peer reviewed data demonstrating an adequate level of inter-rater reliability for the structured risk assessment.

THE COURT: Do you know when he wrote

that article?

THE WITNESS: Within the last year.

THE COURT: Thank you.

BY MS. GRAVES:

Q Not only is there a lack of inter-rater reliability, but is there also a problem with no evidence of incremental validity?

A Correct.

When we talk about incremental validity we're saying okay you have a score on an actuarial instrument -- score on the Static-99R. That score will tell you how accurately you can rule in recidivism risk and that score will tell you how accurately you can rule out recidivism risk.

Now with incremental validity the question becomes more of can we use an instrument such as a structured risk assessment to increase the level of predictive accuracy compared to what we would get from the Static-99R alone.

Let's go back to page 26 of my report for a moment. Let's just look for illustrative purposes at the outcome data for the routine sample.

If the structured risk assessment provided any incremental validity above and beyond

the Static-99R then we would have to see an increase in the frequency of true positive outcomes. The 120 number would have to substantially increase. To get incremental validity correspondingly we would also expect that the frequency of false positive outcomes -- 1277 -- that that number would have to decrease so then we ask okay when using the structured risk assessment are there any peer reviewed data demonstrating that that instrument increases the frequency of true positive outcomes and/or decreases the frequency of false positive outcomes when using the Static-99R and the answer is emphatically no. No such data exists.

Q You pretty much contended that the Static-99R is the best of the actuarial instruments to use until we get this data from U.S. probation.

A Yes.

Q What other factors can you legitimately consider in determining Mr. Comstock's risk of recidivism?

A You can look at how does he respond to a structured interview. It pains me a little to say this but I think I would have to say that the

quality and the status of treatment for sex offenders in the United Kingdom is a little bit advanced ahead of us -- not a lot but a little. David Thornton would be responsible for that.

Dr. Thornton is the director of the treatment program in Wisconsin, but he also originated in the UK and he maintains a faculty appointment in Norway. Dr. Thornton has gone back and forth --

MR. ROYSTER: Objection. Non-responsive.

THE COURT: Sustained. It's very interesting, but let's get to the meat of it.

THE WITNESS: You're right.

BY MS. GRAVES:

Q Let's get to the structured clinical interview.

A The structured clinical interview has been developed by Dr. Thornton and two other figures in the United Kingdom. What it does is to systematically address what situations would put this offender at risk for sexual reoffending, and in those situations that would put him at risk how would he deal with those circumstances.

As I interviewed Mr. Comstock using the

Relapse Prevention Interview it became quite clear and evident that he can identify situations that would put him at risk, and he has well-defined appropriate plans for how he would cope with those risky situations.

Q Is that something that has been validated as a good indicator?

A Validated unfortunately no. When you ask about validation we're talking about would there be a way to score the instrument indicating, for example, that a high score was associated with a low risk of recidivism and vice versa. That would be the ideal procedure for validation and unfortunately that has not been done.

Q How do you know that the structured clinical interview is helpful to use?

A How do I know it's helpful to use?

Q Yes.

A Because I can use it without resorting to my clinical judgment. I can rely on precise well-formulated questions where there is a logical rationale for using those questions and then I respond in a qualitative manner asking myself in this case does Mr. Comstock appear able to respond appropriately in situations and circumstances that

could pose a risk for him and my answer is yes.
Q Is it a concern that the person you're interviewing might be trying to deceive you and just give you the answers that you want to hear?
A Yes.
Q How do you deal with that?
A You ask a number of questions. You look for consistency of answers. You look for how closely is this individual trying to read me. Mr. Comstock doesn't do that. What he does is when he's deep in thought about some issue he looks right over my right shoulder. He looks like he's scanning the wall behind me. What he's doing is he's simply gathering his thoughts but he's not relying on me for any cues.
Q In addition to the structured clinical interview are there other data that you look to?
A Yes.
The whole issue of using -- related to SVR but a little bit different -- the whole issue of can we use any kind of a risk factor to support a conclusion that Mr. Comstock is at risk for sexual reoffending.
For example, can we use a risk factor such as sexual deviance to support a conclusion

that because of his supposed level of deviance he is at risk for sexual reoffending and the answer is emphatically no if we look at the relevant peer reviewed data.

Q Are there any risk factors that the relevant peer reviewed data have indicated would be legitimately correlated with increased recidivism?

A No, not at all. The classic research paper is Hanson --

THE COURT: The answer is no. It's very interesting and I want to learn as much as I can since this is the first time, but I think we have to move on.

BY MS. GRAVES:

Q You say sexual deviancy is one that is not correlated with increased recidivism.

A It appears to be correlated but it's a but issue. That data was reported by Hanson and Bussiere in 1998. Their data reported a correlation of about .25 between sexual deviancy and sex offender recidivism for child molesters whose sexual deviancy had been established by penile plethysmographic data sometimes called PPG data where a device that measures erection is put

around the penis and then the individual looks at pictures of nude and semi-nude children, looks at pictures of nude and semi-nude adults and then you record what does he respond to.

If we stop and think that definition of sexual deviance is not applicable to Mr. Comstock. Given his physical condition on a PPG test he would flat line it. There would be no response. Consequently those data don't fit Mr. Comstock.

Q How about age? Is age something that should be considered in Mr. Comstock's situation?

A Yes.

Q Are you saying age should be considered apart from the way it is used in the Static-99R?

A I think we can supplement the Static-99R with authored age-related data. Specifically go to page 37 relying on my pagination of my report.

In there we see a table reported by Wollert in 2006 in a peer reviewed article and we can look at the age of the offender, the type of offender. We see for offenders between the ages of 68/69 over an eight and a half year period follow-up four percent of those offenders reoffended. Then we go forward to page 37 now we

have a sample of only five but none of those offenders reoffended.

These data additionally underscore that age in and of itself for an individual Mr. Comstock's age can be almost conclusive.

THE COURT: Let's take a break here. We'll take about 15 minutes.

(Recess.)

THE COURT: You may proceed.

BY MS. GRAVES:

Q Dr. Campbell, you heard the testimony of Dr. Demby today.

A Yes.

Q She referred to Mr. Comstock as an outlier in that the actuarial instrument -- the Static-99R -- did not -- should not be applied to him. Can you explain what an outlier is as briefly as you can?

A An outlier is an atypical member of a population.

Q How does one determine whether someone is an outlier?

A With a great deal of error variance

undermining your decision because by definition outliers are atypical and unusual.

For example, let's talk about age and recidivism. If we look at Mr. Comstock's age his risk of recidivism over an eight and a half year follow-up is approximately four percent. That means for a hundred offenders matching Mr. Comstock -- all of them were child molesters -- if I say none of them will reoffend I'll be right 96 percent of the time. If someone says Dr. Campbell can you identify the other four percent I'm not even going to try because the likelihood of my being correct is only four times out of a hundred.

Q Would the number of victims that Mr. Comstock had prior to his first detection or prior to his first prosecution factor into a determination as to whether he's an outlier?

A Not if we're going to rely on an objective instrument such as the Static-99R. Despite whatever the number of his previous victims are the fact remains that Dr. Demby, Dr. Phenix and I all agree that Mr. Comstock's Static-99R score is a two.

I have given you the relevant outcome

data in terms of the levels of accuracy obtained with ruling in recidivism risk and the levels of accuracy obtained when ruling out recidivism risk for a Static-99R score of two.

Q Mr. Comstock completed the Kansas Sex Offender Treatment Program which was a time-limited program. Is there any indication that a time-limited program is any less effective than a goal oriented program?

A No. The--

THE COURT: That's fine. No.

BY MS. GRAVES:

Q No is good.

You did a Relapse Prevention Interview of Mr. Comstock.

A Correct.

Q During that interview were you satisfied that Mr. Comstock's relapse prevention plan was a good one?

A Yes.

Q Would Mr. Comstock having pictures of boys in the ten to 14 age group -- fully clothed pictures -- that were not at all sexual -- would that add to his risk of reoffending?

A Not necessarily, no.

MS. GRAVES: That's all I have. Thank you.

THE COURT: Before you have a chance to cross I just have one question and I'm going to ask it now so you will have a chance to develop it if you want.

What would happen should his sister pass away or become incapacitated? Tell me what that would do if you know or if you have an opinion as to the risk factor.

THE WITNESS: I can tell you the first thing that would happen is Mr. Comstock would sink into a pretty serious state of depression --

THE COURT: That I've gathered from everyone.

THE WITNESS: -- such that he would need treatment.

THE COURT: Tell me if you have a risk factor.

THE WITNESS: Let's assume under those circumstances that he obtains competent treatment with appropriately prescribed psychotropic medication. If he had other sources of support available to him that he had established in the interim between release and his sister's death

then I think he would recover and do quite well.

If he had no sources of social support available to him under those hypothetical circumstances that you described even with appropriate treatment I think he would struggle but if we had very, very effective treatment I think he would eventually overcome those circumstances.

THE COURT: Your answer was not unexpected.

If at least for a period of time there was another factor and that was a probation officer or something like that do you think that would substantially decrease any risk that we may have?

THE WITNESS: Depending on the relationship between Mr. Comstock and his probation officer. If it's a sound constructive relationship with a probation officer responding to Mr. Comstock in terms of I have faith in you, I think you can do the right thing but please understand I'm going to watch you like a hawk but I also want you to know I'm available to you for assistance if you need it I think Mr. Comstock would respond quite positively to those kinds of

circumstances.

THE COURT: Thank you. Government.

MR. ROYSTER: Thank you, Judge.

CROSS EXAMINATION

BY MR. ROYSTER:

Q Dr. Campbell, have you ever testified in favor of civil commitment for a sexually dangerous person ever?

A No.

Q I noticed from your resume that you are not a member of the Association for Treatment of Sex Abusers, is that true?

A Correct.

Q Isn't that where all the research about all the things that you've talked about is discussed?

A Yes. May I explain?

Q She can follow-up with you.

A I get the ATSA Journal.

Q But you don't go to the ATSA conferences and hear how the research is presented, is that true?

A Sometimes I do.

Q When was the last time you went?

A 2004.
Q You agree that Mr. Comstock suffers from pedophilia, right?
A Yes.
Q Part of the reason for your diagnosis was the possession of these pictures that he had in 2008, right?
A To a certain degree. The most important factor was what Mr. Comstock self-discloses himself.
Q It was important enough for you to include that under your diagnosis, right?
A Yes.
Q In fact, that was one of the few things that you reported supported the diagnosis of pedophilia in your report was the pictures from 2008.
A I think my report refers to Mr. Comstock characterizing himself as a pedophile.
Q Other than that and the pictures there's not much else about your diagnosis for pedophilia, is there?
A After he says I am a pedophile there's not much of a need for anything else.

Q The DSM -- you're familiar with that, right?
A Correct.
Q The DSM says that the recidivism rate for individuals with pedophilia involving a preference for males is roughly twice that for those that prefer females, doesn't it?
A That's what it says. Completely unsubstantiated without any data to support the assertion whatsoever.
Q But that is what it says.
A That's what it says. Of course we'll be disregarding it sometime within the next 24 to 36 months when DSM-V comes on-line. Who knows what it will say about pedophilia.
Q You would characterize his pedophilia as in control, is that right?
A Correct.
Q Because you believe or it's your opinion that he currently has the ability to control his urges.
A Correct.
Q That's based on your interview with him, right?
A Correct. Also on the objective data

obtained via the Static-99R and looking at the relevant age-related data.

Q Looking at the Static-99R data you're able to discern that he is presently able to control his sexual urges, is that your testimony?

A No. My testimony is that it is more likely than not that he is able to control his sexual urges because the likelihood of his sexual reoffending ranges somewhere from nine percent to 23 percent.

Q I understood your testimony to be that he currently has the ability to control his urges. Is that your testimony?

A If controlling urges means controlling his overt behavior then yes, that is my testimony.

Q The report that you've written and you've provided to the Court that's a very similar outline to how you do other reports, right?

A Yes.

Q Did you actually read the report before you submitted it to Ms. Graves?

A Yes.

Q Did you notice that you left information in there that pertained to other respondents, other cases that you're dealing with?

A Yes, I noticed that.
Q You left it in there anyway.
A Excuse me. I noticed that after I submitted the report to Ms. Graves.
Q You talked about the Relapse Prevention Interview. Maybe we can take a look at that for a few moments.
I understood your testimony to be that it's the information that he provided in this Relapse Prevention Interview that lead you to opine that he had clearly identified situations that put him at risk, is that accurate?
A Yes.
Q He had well-defined appropriate plans. That's based on this Relapse Prevention Interview.
A Yes.
Q This Relapse Prevention Interview, this assesses a sex offender's familiarity with the goals and procedures of relapse prevention, right?
A Correct.
Q Obviously his familiarity with the goals and procedures of relapse prevention is important otherwise you would not have included it, right?
A Again correct.

Q I believe you testified that this gives you objective data, is that correct?

A It gave me data via a structured interview. In other words, this data is more reliable than relying on clinical judgment and not as reliable as data that had been validated in the manner that an actuarial instrument can be validated.

Q You're asking him a set of questions and he's just answering your questions, is that right?

A Correct.

Q You're basically having to believe what he tells you in order to discern or opine that he, as you put it, had clearly identified situations that put him at risk and well-defined appropriate plans. You're relying on his statements to you.

A Yes.

Q Let's take a look at the first question there. Number one, what feelings or moods would put you at risk for sexually offending again. I guess you tell him describe at least two different moods. You tell him that, right?

A Yes.

Q He does identify two, loneliness or

anxiety. Those are the things that he mentions that would put him at risk, right?

A Correct.

Q Now the second question -- the 1-B -- how well would you cope with such feelings or moods in the future. Describe at least two ways of coping you could use. You did say two ways, right?

A Yes.

Q He says that he would turn to his sister who is very supportive and that's the only way that he tells you he will cope. He can't even identify two ways, can he?

A No, no, no. He continues on and says, for example, my sister might notice that I was focusing on something I shouldn't be -- he's making a veiled reference to a male child -- in the visiting room and she would switch sides of the table with me.

Q It's your testimony that those are two ways of coping that he could use to reduce his risk.

A Sister might respond supportively; sister might respond in a manner that subtly sends a signal to him I know you're having a problem,

let me help you with the problem.
Q I just want to make sure I understand that in your mind it's your opinion that those are two ways that he identifies to cope to reduce his risk, is that right?
A Yes.
Q The second question -- we're not going to go through all of these --
THE COURT: You can take all the time you need.
BY MR. ROYSTER:
Q The question is what thoughts including sexual thoughts and fantasies would put you at risk of sexually reoffending? Describe at least two different thoughts. He says being alone with a child so that's one I guess.
A Correct.
Q Being with a boy who I thought was a prostitute. I guess that's a second way.
A Correct.
Q Just the thought of being alone with a child would put him at risk to reoffend; is that what he's saying?
A What he's saying is it could.
Q Just being merely alone with the child?

A I'm hesitating -- your question about being alone with a child is?

Q What I'm saying is is he communicating to you in response to your question that just the mere fact that he is alone with a child is increasing his risk to commit a sex offense?

A It could.

Q Of course the second part in all these kind of have a how would you cope with these things and the second question there is how would you cope with such thoughts in the future. Describe at least two ways. He says for example, a ten-year-old boy sits down next to me. I would leave. I would be diplomatic saying it's time for me to go meet someone and now I'm comfortable with being alone.

Is it your testimony that those are two ways of coping with the thoughts and feelings that he identified above that put him at risk?

A It's a matter of opinion if that's one complex way or two separate ways.

Q It's interesting that he says I'm now comfortable with being alone because didn't before that he just say in the first question that loneliness or anxiety would increase his risk to

reoffend? How can he be comfortable being alone but it also increases his risk to reoffend?

A Loneliness or anxiety about something and -- now your question is?

Q He is saying he is now comfortable being alone. Doesn't being alone put him at risk to reoffend?

A It could. What he's also saying is I'm more comfortable with being alone now than I have been in the past.

Q But loneliness -- at least he appears to identify that as a trigger, right?

A He's also saying but it's not as much of a trigger as it was in the past.

Q I guess he told you that separate from what you've included in your interview.

A Yes.

Q The third question -- how would you cope -- sorry -- what events might make you more likely to have feelings or thoughts that put you at risk and he says I even have trouble thinking that way, but loneliness, anxiety or feelings.

A You left out feelings of loss.

Q I'm sorry, it does say that.

The third part -- how would you cope

with such events in the future? Describe at least two different ways of coping. He only identifies one, doesn't he? Plan ahead to avoid children. As an example I'd go grocery shopping early in the morning.

A Yes. Later on he talked about wanting to volunteer at an animal shelter but making sure his hours at the animal shelter would be during school hours when children aren't there.

Q I don't see anything about an animal shelter in question three, do you?

A No. The animal shelter issue came later.

Q Let's skip over to question ten. Indicate on a scale of zero to ten the likelihood of you committing a sex offense in the future. His response is I don't think zero is the answer, but it would be very low. I don't want to be over-confident.

On his relapse prevention plan he can't even tell you that the likelihood of him committing another sex offense is zero, can he?

A No. What he is saying is I'm not going to become over-confident. If I'm going to err I'm going to err on the side of excessive caution.

Q But he can't tell you that his risk to reoffend is zero, can he?
A Because he does not want to be over-confident.
Q Mr. Comstock is 69 years old.
A Correct.
Q You believe that this profoundly lowers his risk, right?
A Correct.
Q In fact you believe that it's almost conclusive, right?
A Correct.
Q You referenced the Wollert study in support of this conclusion and that showed that 49 offenders between the ages of 60 and 69 were followed and only two of those reoffended.
A Correct.
Q Mr. Comstock was 58 years old when he was molesting boys, right?
A Correct.
Q He's at least pretty close to the individuals that were 60 to 69 that did reoffend, right, or were offending in that Wollert study?
A No. He's ten years older.
Q I'm saying at the time he committed the

offenses.
A I didn't understand.
Q When he was 58 years old he was molesting boys.
A Correct.
Q He was still offending when he was almost 60, right?
A Correct.
Q Let's talk for a second about this positive predictive value and negative predictive value. Did I say it right?
A Yes, you did.
Q Do you believe that what this Court has to do is make a decision about whether Mr. Comstock will reoffend or not?
A I know the question is an altogether legitimate question and I'm going to politely decline to answer it. It's outside my scope of expertise. I'm testifying as a psychologist.
THE COURT: That's fair.
BY MR. ROYSTER:
Q How long did it take you to calculate those values?
A You have to understand that I calculated all the values for all possible

Static-99R scores and calculated all of the possible values for all Static-2002R scores. The first time around I had some computational errors that were pointed out to me in the peer review process.

Q You got the scores, right?

A Yes.

Please understand the values that you're looking at on page 26 were not prepared for this report per se; they were prepared for my peer reviewed article titled Predictive Accuracy of the Static-99R and Static-2002R.

Q When you were asked to look at this case the first thing you did was calculate the positive predictive value and the negative predictive value, right?

A Correct.

Q Based on the calculation you decided to take this case, right?

A Based on that calculation and based on the Wollert data and based upon my impressions of Mr. Comstock's health status.

Q You reached a preliminary opinion that he was not sexually dangerous based solely on the computations alone, right?

A No.
Q Your deposition testimony where you said and relying on those computations alone I made a preliminary conclusion that Mr. Comstock was not sexually dangerous is that inaccurate?
A Preliminary conclusion that warranted additional interview and obtaining additional information. Your question made it sound as if I made a final conclusion and no, I did not.
Q That's why I said preliminary opinion.
You made a preliminary opinion that he was not sexually dangerous based on the computations alone, right?
A Correct.
Q Of course the information that you gathered later on just confirmed your preliminary opinion, is that true?
A Relying on objective data.
Q Did I understand you to testify on direct examination that there are no risk factors for sexual reoffense?
A They can be used by themselves. What you have to do is combine risk factors together ending up with an actuarial instrument when you do the combination. You never, never rely on one

factor and one factor alone. In 1998 Hanson and Bussiere advised us don't do that; the correlations are too small.

Q Was it your testimony that sexual deviancy is not a risk factor that can demonstrate sexual reoffense?

A Ask the question again. Before I made the mistake of not closely listening.

Q Was it your testimony that sexual deviancy is not a risk factor for sexual reoffense?

A Correct, it is.

Q It is?

A Correct, that is my testimony.

Q A minute ago you referenced that Hanson and Bussiere study. Doesn't the article actually say the strongest predictors of sexual offense recidivism were measures of sexual deviancy?

A The strongest single predictor. That study also said don't rely on one predictor and one predictor alone.

Q The research bears out that sexual deviancy is a strong predictor of sexual reoffense.

A When you rely on phallometric data for

child molesters. And as I explained, you can't rely on phallometric data for Mr. Comstock.

Q The sexual deviancy that is reported isn't entirely relying on the phallometric data, is it?

A Yes, it is. Go to the article you're referring to. Go to page 352. Look at Table 1 -- Predictors of Sexual Recidivism. Look down to sexual deviancy and the first category is Phallometric Assessment (children).

Q A couple below that it says any deviant sexual preference and doesn't reference phallometric data at all, does it?

A No. The problem is, how do we reliably define any deviant sexual preference; that is do we have acceptable levels of inter-rater reliability available to us when evaluators are attempting to identify any deviant sexual preference. No such data exists.

Q The point is that the sexual deviancy that's mentioned in that article doesn't necessarily require a phallometric measure, does it?

A No. The point is --

THE COURT: Just answer the question.

MR. ROYSTER: No is the answer.

BY MR. ROYSTER:

Q Dr. Campbell, with respect to volitional impairment I understood your testimony to be that impulsiveness is a necessary component to find a volitional impairment, is that right?

A Correct.

Q You used the Barratt Impulsiveness Scale to measure his impulsiveness.

A Barratt Impulsiveness Scale. You and I know why we have to be careful about how you pronounce things.

Q This Barratt Impulsiveness Scale, this is another test that you used that requires him to give you the answer; right?

A Yes.

Q You're relying again on his self-report with respect to the questions you were asking him.

A Correct.

Q Based on that score you made a determination he was not highly impulsive, is that right?

A Again correct.

Q Because of that he doesn't have a volitional impairment, is that your conclusion?

A Yes.
Q So the person that has planned premeditated grooming that person can't be -- can't have a volitional impairment, right?
A Correct.
Q Dr. Campbell, when you interviewed him he told you that he could still derive sexual gratification from sexually stimulating a child, didn't he?
A Correct.
MR. ROYSTER: Judge, I don't have any other questions.
THE COURT: Any other questions by the respondent?

REDIRECT EXAMINATION

BY MS. GRAVES:
Q Dr. Campbell, what does that mean that Mr. Comstock would still gain sexual gratification from stimulating a child?
A It has to be followed up with understanding that Mr. Comstock now recognizes that that kind of contact is wrong. It damages children, it harms them psychologically and he

would avoid it also because of considerations of his own self-interest.

When I said to him do you understand if you were released and then are re-arrested for another sexual offense you will die in prison and he said yes. He completely understands that.

Q What's the definition of a pedophile?

A An individual who has a sexual attraction to children.

Q And that's what Mr. Comstock remains to this day.

A Yes.

MS. GRAVES: That's all I have.

THE COURT: Thank you, Dr. Campbell. You may step down.

May he be excused?

MS. GRAVES: He may be excused.

MR. ROYSTER: He can be excused.

THE COURT: Next witness, please.

MS. SHEA: The respondent calls Mary Comstock.

MARY A. COMSTOCK,

was sworn or affirmed and testified as follows:

THE COURT: Give us your full name and spell your last name, please.

THE WITNESS: My name is Mary Alice Comstock C-o-m-s-t-o-c-k. I am Graydon Comstock's sister.

THE COURT: Thank you.

DIRECT EXAMINATION

BY MS. SHEA:

Q Good afternoon Ms. Comstock.

Why are you willing to have your brother live with you despite the fact that he's a pedophile?

A My brother Don has been more than a brother; he has been a father, he has been a friend. To me he is more than a sexual identity.

THE COURT: Take your time.

THE WITNESS: I have seen him from childhood. I've known him for 58 years. I may not remember all of that. I may remember him for only 55 of those years. He was the brother who took me tick-or-treating; he was the brother who took me to school.

I have seen him in relationships with his mother who was in a nursing home for eight and a half years and every Summer he came to live with me. This relationship didn't begin ten years ago when he was incarcerated; this relationship is 58 years in the making and it is much more.

BY MS. SHEA:

Q You've been sitting in court throughout his civil commitment hearing, right?

A Yes.

Q You're aware that the government alleges that he has molested over a hundred children.

A Yes.

Q Does that your change your mind?

A No.

Q Why not?

A Because I believe in second chances. I teach at a community college in which most of our students are students who have made mistakes. They didn't make good grades coming out of school, but they deserve their second chances and my brother deserves his.

Q Tell the Court about where you live.

A First of all I live in Arkansas. In

Arkansas the sexual offender registry is in place. My brother will be a Category 4 sexual offender simply for having admitted that he's a pedophile.

The requirements are that we cannot be within 2000 feet of any school, daycare or park. Furthermore, there is notification door-to-door for 2000 feet within the vicinity.

My home has already been approved -- admittedly on a preliminary basis and for a short term -- but I am also already in the works to get a home that will be more appropriate for my brother.

Heber Springs is a town of 6500. It is a community in which there's a lot of hunting and fishing. It's an hour and 15 minutes north of Little Rock. It is approximately 45 minutes north of Conway, 45 minutes east of Searcy. It is very much in the Bible belt. It is a small community. There aren't a lot of stores. We have a grocery store and a small Walmart. You don't want to dress shop there because there's no dress shop. It's small and everybody knows each other.

Q Do you have any children Mary?

A No.

Q When if ever are children in your

house?

A Never.

Q Are you in good health?

A Yes, I am. I'm not planning to kick the bucket anytime soon.

Q You mentioned this a little bit -- how have you prepared for your brother's potential arrival?

A In 2006 when we anticipated that my brother would be coming home we had the initial reviews by parole at that time --

THE COURT: By the federal parole officers?

THE WITNESS: Uh-huh.

-- in 2 different locations.

At the time I was living in Little Rock and so I made first contact with the parole officer there, and then I had a second parole officer who came to my home there in 2006 and looked at the home.

At that time -- I'll just make the comment -- I was very careful and Don instructed me to be very careful about distances from daycares and parks and so at that time when I was selecting a home in 2006 I was very careful about

making sure that we would be good distances away from different groups. I also chose an area that was primarily retirees.

Secondly I have already gotten rid of my computer. I did it in 2006 in preparation for his coming home. I have not replaced it because each year I anticipated that he would be coming home. Those are the early choices that I made.

Then in 2008 I bought a home again with the knowledge that if I owned my own home nobody could kick me out and nobody could kick him out. I have a home that I have purchased and it is in a small residential neighbor but it sits on half an acre. It has two bedrooms, two baths. We would have separate living areas. It's a good situation.

Yet at the same time I recognize that I want to find a larger home. At the time I bought that house I was approved for 125,000. It doesn't sound like much but it goes a long way in Arkansas. I bought a house for 85 and I put it on a 15-year payout; so at this point four years later I am prepared now to turn around and sell my property and buy a home that will be in an area where we will have larger lots and where we will

have more separation.

Those are the things that I am actively doing. As a matter of fact, I have already made contact with a real estate agent. I have told her exactly what I need. She is a friend of mine so she knows the circumstances. I have already been in touch with my banker. This is what we are currently in the process of doing.

BY MS. SHEA:

Q How will you serve as your brother's support system?

A First of all one of the things that you're already hearing me indicate is I want to make sure he is in a situation of security. I want him to feel as though he can walk outside the door and not have people on top of him.

Also, I want to be sure that the neighborhoods are secure. That people are comfortable with him and that they are aware that he's there. That's part of the notification system. Yet that they will not be threatened by that. I am looking at neighbors that will allow us that opportunity. Those are some of the things that I am trying to provide in the way of a secure home and a support system.

I also know that the emotional support system is a very important piece of this. He is my brother. He is not coming to be some sort of a renter from me. We will share a home. I think that it's important that he knows that I accept him fully.

Q You mentioned briefly you worked at a community college. Can you tell the Court a little bit about your job.

A The community college is about 600 in population. We started in '97 and in 2007 they actually built a college. I teach there full time. I'm an instructor of English. In my teaching I teach 18 hours a week, and on top of that I am committed to the university for an additional ten to 12 hours that are office hours; hours in which I advise students or in which I will be able to see them come and go but that means 30 hours of actual commitment.

I also have a lot of flexibility. There are only two full-time English instructors and between the two of us we work very closely to coordinate so that we are able to spend the time that we need with our families.

My colleague has a husband who has

advanced heart disease and so she frequently has to be gone or she has to make arrangements to take him to and from Little Rock and so we work together very actively.

Q How would being away from home during work hours limit the support that you could offer your brother?

A I don't think that it needs to. In other words, I'm available by telephone. I have the flexibility to come and go. If he has a situation that arises where he needs my support I can be there as I am right now. I'm taking time off from school.

Those are the things that I feel I can offer him. Plus there is a community of friends that I have there; many of whom have already indicated their support of me and my brother in making this transition.

Q What effects have you noticed that incarceration has had on your brother?

A When he was arrested in 2000 he was relatively healthy. He was able to get around. He still had some limp from the early stroke. What I have seen since then, of course, is first of all the stroke that he had as he was leaving

the Kansas prison system that stroke left him with a very pronounced tic for a long period of time -- a facial tic -- and even to this day an active leg syndrome. If you watch you will notice he movers his feet a lot.

Aside from the stroke he, of course, has been diagnosed with diabetes. He had the massive heart attack in Seagoville which led to the open heart surgery in the Spring of 2006. Of course that has left him with the -- he can't even walk -- based upon his reporting to me he cannot walk across the prison yard without having to rest. I'm conscious of that being a problem.

He's had hearing loss. He has had at this point, of course, also the prostate cancer. He is on medication for cholesterol for heart disease. You have heard all of that testimony.

I have seen him become -- sorry Don -- increasingly frail. I have watched him get to the point where each visit is an uncertainty as to whether I will see him again.

Q How would you describe your relationship with your brother?

A We have been close my entire life. Throughout my lifetime we have had a special

connection. We have been friends, we have shared some of the most traumatic events, of course, of lifetimes.

I was the one who had to call him when dad passed away. He was in Peru at the time. We only were able to reach him by way of shortwave radio. We were all together when my mother passed away and we were in the room with her.

During the Summers for the eight and a half years my mother was in the nursing home he was with me for two months every Summer and we did everything together.

Q How often do you two communicate?

A At this point we talk twice a week. I'm not able to get out here as frequently as I was able to visit when he was in Kansas or Texas. At that time I was seeing him every six to eight weeks. Now I'm able to get out here once or twice a year and that's it. The telephone calls are our way of staying in communication.

Q Was there a time in the past when you believed your brother was molesting children?

A No, but I do know that he told me that he loved children and that he was attracted to boys at one point but I did not realize he was

active.
Q Did your brother lie to you in the past?
A I believe he has.
Q Why do you believe now that he will not reoffend in the future?
A First because I have seen the effect of prison. He does not want to come back here. That is a major reason why I do not believe he will offend but I also know one other thing -- he knows as I do that I'm putting my life on the line, too. He will not betray that.
MS. SHEA: No further questions.
THE COURT: Any cross examination?
MR. GRAY: Yes, Your Honor.
BY MR. GRAY:
Q Good afternoon Ms. Comstock.
A Good afternoon.
Q Ms. Comstock, I noticed that you've been sitting in the back of the courtroom for most of the trial, is that correct?
A Yes.
Q It's very clear that your brother is very lucky to have a loving sister like you. You want to do the best you can to provide a

supporting environment for him, is that right?
A Yes.
Q Because you've been here in the courtroom did you get an opportunity to hear some of the testimony about some of his past acts with children?
A I did.
Q Was that some of the first time you heard some of that information in this courtroom?
A Some of it.
Q Had your brother told you about how he lost his job in the Philippines prior to hearing it in the courtroom?
A Yes.
Q Had your brother talked to you and informed you a little bit about some of the things he had been doing in the Netherlands prior to you hearing about that activity here in the courtroom?
A Since his incarceration, yes.
May I add a comment?
Q Absolutely ma'am, please.
A In the Philippines I knew about Michael. Don called mother. I didn't know that they had a relationship, but I knew that he was a foster son. We talked to Michael -- mother and

I -- when she was still in the nursing home.

When my brother was incarcerated Michael contacted me. Michael and I maintained a relationship for many years. I was very much aware of Michael and I have to say a part of his life, too.

Q Did you know about the other portion of the relationship that your brother had with him?

A No.

Q Ms. Comstock, you work at the community college. Is that 8:00 to 5:00?

A No.

Q What are your hours?

A They can vary. Usually I go in somewhere between seven and 8:00 and I am usually home anywhere from two to three Monday through Thursday. Friday we don't even teach on our campus.

Q You understand if he were released to stay with you there would be an obligation of going to such things such as sex offender treatment.

A Uh-huh.

Q Would you be willing to go to sex offender treatment with him?

A I have made that commitment.
Q You heard your brother testify that he didn't feel like he needed sex offender treatment. Do you feel like he would need that treatment?
A I believe that he needs along with his court appointed attorneys and the agreements in the legal system to make decisions. I am not making his decisions for him, but I will be supportive of the decisions that are made to support his care.
Q Ms. Comstock, if he were to be ordered to go to sex offender treatment and he didn't go what would you do?
A Considering that now I'm his primary transportation I'd probably hogtie him and put him in the car.
Q If Mr. Comstock had a job walking dogs or around dogs -- we know how little boys like dogs -- how would you react if he were walking a dog and a small ten-year-old boy came up to him?
A Of course that's on the assumption that I'm with him. I can certainly make sure that a small ten-year-old boy turns around and goes back the other way. I have a gift for doing that.
Q If you weren't with your brother and

you were to learn about a ten-year-old boy approaching your brother what would you do?

A I think that that is a question that also requests what exactly was it about. In other words, did my brother then bring him home. That's a completely different answer.

If a boy approaches him on the street and says I want to sell you baseball tickets and my brother Don says no what am I supposed to do? I think there are some areas that I too will need guidelines.

One thing that you should be aware of is that in the State of Arkansas all teachers including community college teachers are mandatory child abuse reporters.

Q Ms. Comstock, if you were to find People Magazine or a magazine that had photos of young boys in the house what steps would you take? What would you do?

A I would certainly eliminate the magazines. You're talking about People Magazine. Some of these magazines are routine things that we get that come in.

Let me ask you the question -- if I receive a paper -- I write a column for the Sun

Times for our area -- if I receive a paper a lot of times our papers may have pictures of children that are swimming in the lake -- obviously we're not going to keep them around; we're going to throw them away and put them on their way.

If I see my brother collecting certain types of information I'll talk to him about why and what's going on and find out whether he needs further assistance in dealing with some of the issues.

Q Would you do anything else?

A What would you expect me to do? I'm really asking straight out.

I would talk to him about what the situation is and refer him to others for treatment or for guidance I think is kind of what goes with the territory, isn't it?

If he has a parole officer then this might be an instance where the parole officer becomes involved.

MR. GRAY: No further questions, Your Honor.

THE COURT: Assuming that he may or may not have a probation or parole officer -- assuming he did though, would you have any hesitation

whatsoever of contacting that person should you have any concerns whatsoever whether they be minor or major? Would you have any concerns thinking you're getting your brother in trouble or anything of that nature?

THE WITNESS: Maybe I should have actually said this earlier. At one point I worked for the Department of Community Correction from 2005 to 2006. I was a management analyst. That does not make me an expert in criminal justice. I was a management analyst working with statistics. I got to know a lot of the parole and probation officers. I'm comfortable with their role. I understand that what they are trying to do is trying to help people incorporate into the community. I don't think that I would have any problem.

THE COURT: I guess I'm more concerned about your role. I would have a hard time picking up the phone and calling if it was my sister or my brother. I see it happen all the time in family situations where it's a son or somebody -- the parent has great intentions as I know you do -- but can't make that call. Do you think you can make that call whether it be probation officer or

authorities or somebody else? I know and I see it happening. It's easy to say and hard to do. Do you think you can make that call?

THE WITNESS: I can make that call.

THE COURT: You understand the importance of not remaining silent not only to your brother but to society?

THE WITNESS: I do. I understand the importance to him, to society, to me.

THE COURT: Your standing in the community -- the fact that this is going to have to be reported and so forth -- your neighbors are going to know -- I suspect that you have a close-knit community -- how do you feel about that?

THE WITNESS: It's going to be difficult.

THE COURT: Have you discussed this with your friends or with people that you consider to be part of your social structure?

THE WITNESS: Certainly some of them.

THE COURT: Tell me about your support system. What kind of support system do you have in your town or your community?

THE WITNESS: As you heard me say I

write a column for the paper. A couple of years ago I was voted in as the outstanding faculty member. We only have 11 but I was voted in as the outstanding full-time faculty member for that year. I am in a situation where I've got a lot of students that really care about me. I have a small college that cares about me.

I have also been a member of a Presbyterian church there -- in which I am the youngest member -- does that worry you -- I am a member of that Presbyterian church or at least attend and I have started a spiritual discussion group there in which we are a little more unconventional. We like to talk about things like touch therapy and reincarnation and different forms of meditation. We have a group of about 16 to 20 now that meet on a regular basis. They are all part of my support network and some of them will become part of Don's.

THE COURT: If you had to make that phone call and you needed some strength and support these are people you would go to?

THE WITNESS: Yes.

THE COURT: You have in the past when your mom passed away and so forth?

THE WITNESS: This is a new community. Mother passed away in 1999 two months before Don was arrested. When she passed away I had a completely different community around me. I have been here now for five years. For that five-year period I have made friends gradually but I have developed genuine friendships.

THE COURT: People you think you could go to for support and you have gone to?

THE WITNESS: Yes. A wide range including an attorney who is looking forward to meeting Don.

THE COURT: Since you have been in this town are you aware of anybody else living in town that would be on the list?

THE WITNESS: Yes.

THE COURT: This wouldn't be the first occasion for this town.

THE WITNESS: No. It's not a pleasant event for any of them.

THE COURT: I'm just trying to get a feel for what's going to be happening.

THE WITNESS: I actually had a friend that was a sexual offender back from 1990 and

recently it was posted on the web sites and he lost a job. I didn't even know until I saw his picture.

THE COURT: I know this is probably a difficult question -- I know you have another brother. Do you have a relationship with him?

THE WITNESS: Yes.

THE COURT: I know the history there -- we all heard it here in court. Is there anything in that that would interfere?

THE WITNESS: He will be visiting.

THE COURT: He's reaching out also.

THE WITNESS: He and I have talked every evening since I've been here. David went with me to visit Don the entire time Don was in Kansas.

THE COURT: He actually visited?

THE WITNESS: Yes.

THE COURT: How far does he live from you?

THE WITNESS: At that time he lived in Kansas. It was convenient for him. He visited and once without me there. On a Christmas Eve he went to visit Don.

THE COURT: Where does he live now?

THE WITNESS: He now lives in Salem Springs, Arkansas which is about four hours from me. He will be visiting. He has already confirmed that with me.

THE COURT: Has he in the past visited you in Little Rock or in this new town?

THE WITNESS: Yes.

THE COURT: Do you visit him?

THE WITNESS: Yes. As a matter of fact I just missed Thanksgiving with him.

THE COURT: Does either side have any further questions?

MS. SHEA: No further questions.

THE COURT: Any further questions?

MR. GRAY: No, Your Honor.

THE COURT: You may step down. Thank you.

Any additional witnesses that have popped up?

MS. GRAVES: No, Your Honor. We would like to move into evidence --

THE COURT: Let me get my list. Let's work off the list that's contained on page five.

MS. GRAVES: One through eight there is no objection.

THE COURT: They will be received.
MS. GRAVES: Number nine is an article that Dr. Campbell referred to and relied on in his assessment. We would offer that under 803-19 as a learned treatise.
THE COURT: What's the petitioner's position?
MR. ROYSTER: I think it's actually 18.
THE COURT: It's 18.
MR. ROYSTER: It's our objection that these are hearsay.
THE COURT: It indicates here they were not produced. Do you have them now?
MR. ROYSTER: We do have them now.
THE COURT: I'll admit it. I don't know how much weight I'll give them or if I'll even read them. I'll put them into the record since he testified to them. In fact I'm not going to read them and I'm tell you that right now.
Somewhere down the line since they have now all been produced and both sides have a copy there's no reason not to have them in. That would apply all the way through the end.
MS. GRAVES: Yes, sir.
THE COURT: I'm allowing them only

because of the fact that number one they've been produced, and number two they've been referred to. Certainly the weight they are going to deserve is based upon the testimony and not based upon the articles because I have no intention nor the time to read all those articles.

The respondent rests?

MS. GRAVES: Yes, Your Honor, we rest.

THE COURT: Anything by the petitioner?

MR. ROYSTER: Judge, we would like to call Dr. Phenix for brief rebuttal.

THE COURT: You may do so.

AMY PHENIX, Ph.D.,
recalled to the witness stand:

THE COURT: Dr. Phenix, you may take the stand. You're still under oath. Just give us your name again for the record so the court reporter has it.

THE WITNESS: Amy Phenix.

REDIRECT EXAMINATION

BY MR. ROYSTER:

Q Dr. Phenix, were you in the courtroom to observe Mr. Comstock testify?

A Yes, I was.

Q Did you make any clinical observations about his testimony?

A Yes, I did.

Q What clinical observations did you make about Mr. Comstock's testimony?

A In many ways he still seems to me and appears and presents to me as an untreated sex offender. He still expresses some troubling cognitive distortions about his offending, about his behaviors.

For example, I think first and foremost he believed that collecting pictures of boys that were in his victim age range -- a boy that was nude and obviously would be an erotic stimuli for him -- collecting them -- putting a lot of effort into collecting them -- having close to a hundred of those as recently as 2008 -- he doesn't see any problem with that. He kind of dismissed that as what's the big deal; even noting that the Court would not really think that was a problem if they looked at them.

Q What is the big deal? You heard the testimony from one of the witnesses -- I think it was Dr. Corvin who mentioned it wasn't that big a deal I think. Why is it a big deal?

A Anyone that is familiar with sex offender treatment and precursors to offending knows that this would be absolutely forbidden behavior. He should be avoiding any type of child stimuli that would cause him to engage in any type of sexual fantasy.

The reason on the treatment wards for sexually dangerous persons that you cannot have this kind of material and that it's screened so carefully in the mail is because it's a high-risk behavior and that is one of the first things that a person would learn in sex offender treatment is to avoid anything that would be a trigger for sexual fantasies or sexual behavior.

It's troubling that to this day walking out into the community that he would believe that it would be okay to collect pictures of naked boys between ten and 14. That's just one of the observations that I had.

He's a person who says I'm safe now in the community because I have low libido. He even

told me in my interview I think it's really okay now to be around children because I have low libido. It's never okay for Mr. Comstock to be in the presence of children. Perhaps if there is very strict supervision, but ideally never in the presence of children because he has such a very, very strong attraction to them and such a strong emotional identification to them that to break that pattern he must not be in the presence of children.

To begin to say I'm okay enough for any reason to be in the presence of children for Mr. Comstock is a cognitive distortion and a high-risk situation.

He's a person that sat up here and after being a treatment failure has said I don't need treatment. This is a person that all of his life he has struggled with these deviant sexual fantasies and urges. He's had 100 victims at least. He sits here after being a treatment failure and says I don't need treatment. I'm okay now. That can't help me in any way. That leaves him with nothing to help him to remain sex offense free, to help him with these strong urges that he gets to be in the presence of children, to touch

children, to feel the love of children.

In sex offender treatment offenders will develop offense cycles. It starts with the very beginning of offending. What's the first behavior thought that occurs that carries them on and on and on to the point where they actually offend.

He would have in treatment examined his offense cycle and all of those precursors to offending, and he would have learned strategies to stop himself along the way.

He talked about up here on the stand when he molested Bento. Bento was a nine-year-old male who he hugged and fondled his genitals in his apartment. He was asked was that a spur of the moment act and he said yes, it was spur of the moment.

I didn't provide treatment to Mr. Comstock, but just looking at his offense cycle and what he's admitted to -- he admitted to meeting parents in order to ingratiate himself to children and that's exactly what he did with Bento's mother to be able to get permission to drive both of the boys places, to get permission from mom to have Bento over at his apartment.

He said he knew Bento for six months prior to this molestation. He was caring for him, he was feeding him in his own home and so the stage was set for six months. It's just impossible for me to believe that in a moment with no sexual fantasies, urges and planning that he suddenly molested this boy because it was exactly like all of the times that he planned those molests.

I think that he is not in touch with those aspects that have caused him such problems and difficulty with his volition in the past; and I think his cognitive distortions have not been sufficiently addressed in treatment so he will have those volitional controls when he gets out.

Q Did you read the Relapse Prevention Interview that Dr. Campbell put together?

A Yes.

Q Did you hear Dr. Campbell testify about it?

A Yes.

Q Do you think that that is a sufficient relapse prevention plan?

A It's superficial, it's completely insufficient. It mentions a few of the thoughts,

feelings and behaviors that have been problematic. It's in no way a structured relapse prevention plan that provides for interventions for these types of behaviors for his reoffense cycle; the strategies and techniques that he'll use in the community in order to prevent relapse. No, it's completely and wholly inadequate.

Q What about the fact that his sister is so willing to have him come in her home and stay with her?

A It's a double-edge sword. He's incredibly lucky and it's a gift to him that he has such a loving sister who is so invested. We know that love is not enough. I wish that it was.

It's going to be an incredibly difficult adjustment to the community particularly in a small town where everyone knows everyone and where the community -- particularly today and in the last years -- finds sex offenders so reprehensible and really make their lives utterly miserable when they're released to the community particularly with Level 4 notification.

In my experience having recommended offenders be released from sexually violent predator programs in the state I had one who his

car was shot at. Just unbelievable kinds of behavior and reaction to the community.

I think it takes a very strong support system from probation officers, from treatment therapists and incredibly strong-willed people to be able to live through that and survive that.

Q Did you hear the testimony of Dr. Campbell relating to the SRA-FV?

A Yes, I did.

Q Why did you even use that?

A The SRA-FV is one of three newer instruments that is a collection of the validated, dynamic or changeable risk factors. In fact, contrary to what Dr. Campbell said the reason that we examine dynamic risk factors -- and today frankly are really excited to have identified the dynamic risk factors -- is because they add a significant amount of incremental validity to the static risk factors.

There is a statistical measure of incremental validity. What that means is that you would only consider additional risk factors if they add new information and improve the prediction.

The SRA at the current time has the

greatest incremental validity when added to Static-99, and as a result that's the instrument that I chose to use because it helps to improve prediction over my actuarial instrument.

Q Does Mr. Comstock appreciate his level of risk?

A I don't think he appreciates his level of risk.

Q Why do you say that?

A Because realistically on a scale of one to ten he's not a one risk. A normal human trait is to minimize something bad about yourself or something wrong with yourself. We all do that. It's just human. Only through treatment can we really confront what that risk is and then accept the interventions that are important to keep the person safe and the community safe.

He says to me I think that I can be around kids. He's not appreciating his risk. I don't need treatment. He's not appreciating his risk. I'm a one on a scale to ten -- a person with a hundred victims; a person looking at child pictures in 2008.

I think he grossly underestimates his risk and I think he grossly overestimates his

ability to refrain from seeking out children.

MR. ROYSTER: I don't have any other questions.

THE COURT: Any questions counsel?

MS. GRAVES: I don't have any questions.

THE COURT: You may step down Doctor. Thank you very much.

Petitioner rests at this point?

MR. ROYSTER: Yes, Your Honor.

THE COURT: Now that both sides have rested let me tell you what I have in mind and if it interferes with anybody's life please let me know.

I would like to hear very short, maybe ten-minute closing arguments. The reason I say short is that each of you have submitted to me proposed Findings of Facts and Conclusions of Law. Then I would like to take a recess for about a half hour.

As to two very important issues there's no dispute. The third which is extremely important is the issue that we have all focused in on in this trial and it's an issue that the Court has to decide. I have been listening very

carefully. It's my intention to render a bench decision for lots of reasons which I will explain more later.

This is a very old case. I could spend a lot of time writing on it. Probably I will have to write on some of these because I think I'm going to have to make some impressions and so forth. The age of this case, the development of the case and the way it's been developed I think it deserves a rapid resolution.

With that said petitioner anything you have to say in the next five or ten minutes I'll be more than happy to listen to it.

MR. GRAY: Your Honor, as the Court has recognized this entire case comes down to the third issue of whether or not Mr. Comstock is going to have serious difficulty refraining from engaging in acts of child molestation.

I think things can be best summed up by the testimony of Dr. Phenix and Dr. Demby which is he does not recognize the risk. We're talking about somebody who as recently as 2008 basically talked about his 40 years of working with boys on an almost daily basis and claiming that he wasn't caught until the age of 58. That's from the first

paragraph of Government Exhibit No. 20. This was written after they had found photos of children within his cell room. He explained to the Court well, what's the big deal. The one little comment about what's the big deal really does kind of sum up the level of cognitive distortion that we have here.

The fact he doesn't recognize why it's a problem for a 58-year-old man and now a 68-year-old man to possess pictures that he took time to cut out, store of the very type of person he's sexually attracted to -- we're talking ten to 14-year-old prepubescent males -- and keep them after going through at least three rounds of treatment; going through the Kansas SOTP -- Sexual Offender Treatment Program -- yet still thinking it's okay for him to possess this sort of material without recognizing the triggers that it's causing, the risk that it's raising, the things that he's dealing with.

One thing that we have learned is that his risk is not simply risk driven by libido. His risk as he testified to is driven by an emotional attachment; the fact that he loves these kids, that he cares for these kids and he creates a

relationships with these kids.

Despite the fact that he had a stroke, triple bypass, radiation treatment and all the medication that he's been on still in 2008 he couldn't fight the urge to take time to collect a bunch of photos from various sources just so he could keep them in his room under his bed in a box.

When we take a look at what we have here he summed it up best when he said he is emotionally driven to being with these kids. He says that he's been emotionally connected to kids -- he explained this when he said that he has had emotional connections to dozens of kids that he's molested.

The one consistent thing that all of the experts have said is that this emotional attachment is a very strong thing for Mr. Comstock. This idea that his age, his medical condition, all the other factors that would normally prevent him from being a higher risk the fact that all those don't play a role in reducing his risk only emphasizes that he will have serious difficulty refraining from engaging in child molestation in the future.

Even Dr. Corvin who testified about the numerous medical maladies that were present in Mr. Comstock -- when asked would these prevent him from engaging in child molestation -- Your Honor I'm paraphrasing the question -- his answer was nope. That's a very telling thing.

It's quite a recognition of the level of risk we see within a person like Mr. Comstock. Mr. Comstock doesn't recognize the risk. He told us that he feels like he doesn't need any treatment. He told us that he thinks he won't offend again because he's afraid of going back to jail.

These self-serving statements were relied upon quite heavily by Dr. Campbell. We need to take his statements for what they are. They are self-serving statements. These self-serving statements apparently seemed to have developed in the last two years.

What we know is that he will continue to have serious difficulty refraining from child molestation unless he receives and engages in positive treatment within a sex offender program. This is the opinions of Dr. Phenix and Dr. Demby who said his needs are emotionally driven because

he has trouble controlling himself. His urges aren't driven simply by sexual desires, but they're driven by that emotional need to connect with his victims. This is the type of person who needs sex offender treatment in order to reduce his overall level of risk.

He has proposed a relapse plan and this relapse plan is not a realistic relapse plan and that's from the testimony of both Dr. Demby who called it sketchy and Dr. Phenix who said it was superficial.

When we take a look at what was presented over the last two days, Your Honor, and we take a look at the person who Mr. Comstock is we see a person with a history of over a hundred victims who just doesn't understand his level of risk. Unfortunately in the community the risk is out there.

Mr. Comstock may be an appropriate candidate in the future after receiving treatment within the certified treatment program and after being certified he may be a candidate for conditional release where the Court can impose additional conditions based upon his completion or progress within a certified commitment program.

However, he is not there yet. He's clearly in a position where he needs the additional treatment regardless of his thoughts whether he needs it or not and that's simply because when we look at the level of risk he doesn't recognize the risk. Unfortunately the risk is out there on newspaper shelves, newspaper stands, on the television with the Little League World Series -- the risk is out there.

The question we have to ask ourselves is is he going to have serious difficulty refraining from engaging -- serious difficulty refraining from engaging in child molestation. The evidence that the government has put forth over the last two days has shown by clear and convincing standards that he will have serious difficulty refraining from engaging in child molestation if he is released. Thank you.

THE COURT: Thank you.

MS. GRAVES: Your Honor, we don't civilly commit people in this country for looking at pictures of fully clothed young boys.

Dr. Campbell and Dr. Corvin have testified that looking at pictures of those types do not correlate with increased recidivism not

even for Mr. Comstock.

When you look at Mr. Comstock today the government wants you to focus on everything he's done in the past. He has done a lot of harm in the past. He acknowledges the harm he's done in the past. His past is his past. He is trying to move forward and he has done and said everything that he can do to indicate his intention of moving forward without molesting another child.

He successfully completed the sex offender treatment program in Kansas. Contrary to what Dr. Phenix testified to he's successfully completed the program. He has said the right things.

Dr. Phenix testified on cross examination that she simply chooses not to believe him. What more can he do? He will never be able to convince her that he is suitable for release because she simply will not believe him, Your Honor.

That's what this Court has to decide is has he done everything that he can do? Has he done what's been asked of him?

This man has been locked up five years now past his release date. He submitted to the

program, he completed the program and his participation was used against him. Even to this day every effort he makes to participate in the program is being used against him yet the government wants you to continue to lock him up and have him participate in yet another program.

Mr. Comstock's age and medical conditions undoubtedly reduce his risk of sexual recidivism. You heard the testimony of Dr. Campbell and Dr. Corvin on this point. Mr. Comstock suffers from some significant medical conditions.

Just think about Mr. Comstock's pattern of sexual offending. It starts with teaching and coaching. It is consistent throughout his offending history. He grooms children, he grooms young boys and he offends. Mr. Comstock is not the guy who is walking down the street and molests the first child that he sees or grabs the first boy that he encounters. That's not at all his pattern.

When you're talking about serious difficulty in refraining you've got to look at the man in the context of who he is and what's he's done in the past and look at him now. What's the

opportunity? He's no longer a teacher. He will not be out in the community teaching. He will not be bringing boys home to tutor.

His sister is agreeing to take him in. The statute says if released. We're looking at right now. Would Mr. Comstock have serious difficulty in refraining if released. We have to look at the conditions right now that he would be released to and we have to look at the man as he is right now.

He has said everything that he can say to indicate that he doesn't want to offend anymore and that he has control of himself and the government simply chooses not to believe him. It's really that simple. How can he say more?

A telling point is when Dr. Campbell was on the witness stand and he was cross examined by Mr. Royster about the fact that Mr. Comstock could not say that his risk was zero. Then Mr. Gray stands up and argues that he won't acknowledge how high his risk is. He's damned if he does and he's damned if he doesn't. There is nothing he could say to satisfy them.

He has gone through this entire process. He's been as candid with the Court as he

possibly can. He's making every effort. His sister has been just above and beyond whatever anyone could envision for a placement opportunity for someone who is being released from prison let alone someone who is a convicted sex offender. There is no better situation.

So many of these folks will leave prison homeless. They will have to sleep under a bridge. Mr. Comstock has this wonderful situation and this tremendous support system.

Dr. Phenix would sit here and say that love is not enough, family is not enough. What more is there?

He's willing to follow whatever rules the Court would impose. He's subject to three years of supervised release. The Court will retain jurisdiction over him during that period. The Court could impose any set of conditions. The Court could require him to take sex offender treatment.

This man has never been a recidivist. This is the first time he has encountered the criminal justice system. Everything you look at, every actuarial that has been validated everything looks at whether someone continues to offend after

they have been through the criminal justice system and after they have been punished have they learned their lesson.

This really is his first second chance. He's never been punished before. Here he is 69 years old, in poor health -- he's not sexually dangerous Your Honor.

The government has failed utterly in their burden and the Court should so find.

THE COURT: Thank you.

We'll stand in recess.

(Recess.)

THE COURT: Let me apologize for keeping everybody waiting. It's been a long time since I've written out and done a bench opinion quite like this but I thought it was important as I told you before. I'm so used to dictating and my secretary doing it and with my shorthand and my law clerks know what I'm talking about and getting it back on my desk a short time later. It took me a little bit longer. I apologize up front. Hopefully it is thorough and complete and will answer all questions that need to be answered and

will cover all the issues that are important to be covered.

I think it's important in this particular case to get an opinion out ASAP. The case has been going on a long time for everybody.

When I first got this assignment I knew it would be a difficult assignment. I had never heard of the statute. I didn't even think one of these kind of statutes could even be in existence very frankly until I started reading the law and seeing what's going on and then I kind of questioned whether or not at this stage of my career I should be involved in these kind of cases where the decisions are rough and the stakes are high but that's what I get paid for and I'm glad to do it and it's my intention to do it and to do it as best I possibly can.

With that said I'll be handling these cases on a fairly regular basis. I know the bar is limited on both sides because of the nature of the cases, the experts are limited because of the nature of the cases. Each case as I see it I'm going to call it. What I might decide in one case may not overlap other than the law will be the same. In another case I don't want anybody to

think that I'm telegraphing or saying anything that would affect any other case -- it absolutely won't. The issues of expert reports, the issues of credibility -- all of those things I think each case has to be treated separately.

I understand that the bar is limited in terms of respondents, it's limited in terms of petitioners, it's limited in terms of experts. I will absolutely consider each one individually and I don't want anybody to think that I may comment on a credibility issue or anything. Each case I am going to look at as an individual case because I think it has to be done so with the realization, however, that I'm going to probably hear cumulative testimony but each one will be different.

Also I think that it's important to say that in deciding this case that I'm deciding it on this case only; the law of this case, the facts of this case as I heard them here in the four corners of this transcript. I heard lots of other things and I'm certainly aware of lots of things that happened.

I find the conduct of Mr. Comstock deplorable. I think we all do. That's not going

to influence what's going to happen here. Very frankly, if I was the sentencing Judge and knew what I knew here -- I don't think the sentencing Judge knew all of these things -- I'm just being up front -- we wouldn't be here. He would still be in prison. We wouldn't be discussing this as an issue. That's my philosophy of sentencing and so forth. However, that's not why we're here and I don't intend to let that interfere with my decision in any way whatsoever.

I have respect for what I do, I have respect for the parties and I have respect for the law and I have become very familiar now with 4248 -- four numerals I had never known before. Every time I talk to somebody, a lawyer, a colleague, the U.S. Attorney in Michigan who is my former law clerk and anyone else about it there are very few people that know about 4248 but we're getting to know it very well.

With all of that said I'm going to try to take my time. Sometimes I have a difficult time reading my own writing, but I certainly know what's in my head so I'll try to get it out as best I can.

I think starting off there is no

dispute as to two requirements of the act. Number one, that Mr. Comstock does not contest that he has engaged in child molestation in the past and that the government has established by clear and convincing evidence this element. I don't think there is any dispute as to that.

Number two, there is no disagreement that Mr. Comstock suffers from pedophilia and that this is a serious mental illness, abnormality or disorder and that the government has established this by clear and convincing evidence.

The issue I have before me is would respondent have serious difficulty in refraining from sexually violent conduct or child molestation if released. Serious conduct is serious behavior that would be difficult for the defendant to control.

The Court finds that the past activities of respondent were designed and executed to fulfill his needs both emotionally and physically. That respondent has changed his opinion of his actions and their effects on the victim recently and society's views and so forth.

That the respondent is not going to seek additional counseling or treatment

voluntarily. I think he's made that pretty clear from the record. That he's going to rely upon his own motivations and perceptions of his ability to control and other things within his environment at the time.

The Court finds that the respondent also suffers from many kinds of things. He suffers from major depression disorder which appears to be in remission at this time; as well as the fact he had a stroke at age 39 the results of which both affected him physically as well as mentally. His heart condition, heart attack, triple bypass, diabetes, prostate cancer, high blood pressure, memory declining -- I think there is no dispute as to the medical condition of the respondent in this matter.

The Court has been impressed with the credibility of the witnesses in this particular matter and the testimony as it relates to this particular case and finds that the psychologists have one common thread in that they all agree that Mr. Comstock had a score on the Static-99R for self-offender of a two. I'm not sure from that point on other than the two petitioner's experts they agree on a whole lot.

The Court heard a lot of testimony from the expert testimony from both sides why the two may not be the appropriate key in this case.

We heard from petitioner's witnesses that the age reduction in this case is not appropriate because of several reasons; the primary of which were the age of 58 when his offense occurred and the health issues according to petitioner's experts were not a major mitigating factor.

The Court heard testimony of Dr. Campbell and he opined on several issues. The one that the Court believes is somewhat relevant and important in this particular matter is that it has been established -- there's been no counter-evidence to it -- on page 37 of Dr. Campbell's report where he is laying out the evidence and the statistics and so forth -- he opines and shows at his table that after age 70 there is zero chance of recidivism. I think that's an important consideration in the findings of facts and conclusions in this particular matter.

I also think it's important to discuss in some detail the testimony of Dr. Corvin. Dr.

Corvin's orientation was somewhat different than the other experts that testified in this case. They were psychologists who are very highly trained and well qualified. Dr. Corvin's orientation was more of a medical orientation, and also he was presented as an expert in that area as opposed to other areas. The Court believes that his conclusions that due to the respondent's age, medications, medical conditions that this has decreased his sexual stimulation. He has sexual dysfunctions, he has lower libido. Dr. Corvin opined that the likelihood of engaging in child molestation or similar kinds of conduct would be substantially decreased.

The Court finds that is certainly consistent with the literature that he cited and with his own evaluations and so forth and that is another aspect that I think is a very important aspect in this particular matter.

The Court believes from the limited amount that I've heard here today and yesterday that this isn't a textbook case. If it was a textbook case it would certainly be perhaps much more level but it isn't a textbook case. All the psychologists agree statistically in terms of the

two and so forth that there's reasons to have other considerations other than just the statistical analysis. That the 2002-R in this particular case has facets that should also be considered.

I think it's important and I listened very carefully to Dr. Demby. She said the respondent would have to turn around 180 degrees to get his needs met in a different way and manner. I think that was very telling, but I also think from listening to the testimony and find in this particular matter that because of Dr. Corvin's testimony in terms of his conditions and likelihood of him even having that need in any kind of compulsive inappropriate way would be very greatly deminished.

His former MO was to cultivate relationships and friendships through his work and gain confidence both of the kids as well as their parents. The Court believes this position or his MO is no longer viable; that he does not have the ability to do so, does not the have the wherewithal to do so.

The Court finds that respondent no longer has not only the ability or the resources

to do so but the Court finds that a major deterrent is in place in this case and that is the realization of substantial and great punishment. I think taking that into consideration along with the other testimony is a very important consideration.

The Court is not impressed at all with the relapse prevention plan contained in Respondent's Exhibit 5, but I am impressed with some other things that I think are very good relapse prevention plans. Number one is I'm impressed with the relapse prevention plan of the respondent's sister. I think she is going to keep a watchful eye upon him. Respondent is going to have a supportive living arrangement upon which he can rely. I think his sister has made it very clear that she is going to keep a close eye on him. I think she has also made it very clear that she realizes what her responsibilities are and that her responsibilities even go further than just as a loving relative but go to her own profession and her own sense of right and wrong. The Court believes that she does have the financial ability to do that which she has indicated that she would do.

The Court also believes a very good relapse prevention plan is the 6500 sets of eyes in the town. Dr. Phenix I think hit the nail on the head from what I understand her testimony was and that was it is very difficult especially for what she characterizes as Class 4 -- which I'm not familiar with either way -- to exist in a community where the community knows of this and she even gave us some examples. I think that is part of the plan in this particular matter. 6500 eyes in a town as described to me I think is a very important consideration.

I think part of that plan also is the three-year supervised release that the respondent will be subjected to should he be released.

The Court has had an opportunity to review the conditions. They are part of an exhibit in this particular matter Bates stamped 000006. The conditions are not only the standard conditions of supervised release as we all know them, but also some very specific conditions including to abide by all the laws, that he shall not have a computer, that he will not have contact with minors. I know that those are all theoretically good and I think it's part of this

whole prevention program.

I think the other part of it is his medical condition as Dr. Corvin testified to and I think as has been testified to here on several occasions. I think another one is his failing health. All of these the Court believes are all part of the plan that should be implemented.

Taking all of these into consideration and taking all of the testimony that the Court has heard and the law as I have just indicated the Court finds that the government has failed to establish by clear and convincing evidence -- when I say clear and convincing evidence I have used several standards in trying to formulate this. The case law talked about firm belief using that as a standard. The courts have spoken about highly probable. I've used that as a standard. Of course the more traditional definition is more than preponderance but less than beyond a reasonable doubt.

Taking all of those things and looking at it and taking the testimony and the evidence and determining credibility, determining the kinds of things that are necessary by clear and convincing evidence the Court finds that the

government has not established by clear and convincing evidence that respondent would have serious difficulty in refraining from sexually violent conduct or child molestation if released and so for those reasons the Court will enter an order that the defendant be released from custody on this case. I'm not sure what's happening on his other case or anything of that nature.

Starting with the petitioner is there anything that you think that I have not included that should be included?

MR. ROYSTER: No, Your Honor.

THE COURT: Defense?

MS. GRAVES: No, Your Honor.

THE COURT: I want to thank both sides. I have not had an opportunity to appear before this bar before. I think both of you have done a phenomenal job for your clients.

The preparation of this case was some of the finest preparation that I have seen. I told Judge Gates the same thing. I said I have been traveling for 23 years to courts outside of ours. This year we've probably been in three or four different courts including our own. The quality of preparation and the quality of

documents that have been filed are outstanding under any standard around the country that I have seen. That includes the preparation of witnesses, the reports that have been submitted by experts.

It's an all around pleasure to come in and to be able to just have the luxury of trying a case that is so prepared and we had an opportunity to see such great pleadings. With that said we'll stand in recess. Thank you very much.

(Court adjourned for the day at 7:15 p.m.)

REPORTER'S CERTIFICATE

I, Joseph C. Spontarelli, court reporter, do hereby certify that the pages contained herein accurately reflect the notes taken by me, to the best of my ability, in the above-styled action.

Joseph C. Spontarelli

Joseph C. Spontarelli,
Court Reporter